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THE
LAW OF TORTS
OR
PRIVATE WRONGS.

BY
FRANCIS HILLIARD,
AUTHOR OF "THE LAW OF MORTGAGES," "THE LAW OF VENDORS AND
PURCHASERS," ETC.

IN TWO VOLUMES.
VOL. II.

BOSTON:
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THE LAW OF TORTS.

THE LAW OF TORTS.

CHAPTER X.

TORTS TO PROPERTY.—POSSESSION.

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| 1. Possession, as the general foundation of property. | 15. Possession in case of <i>trust</i> or <i>public authority</i> ; who is entitled to an action. |
| 5. Possession is sufficient to maintain an action. | 17. The title of a third person is no defence. |
| 7. Without reference to property; and even though wrongful. | 18. Otherwise with a title and right of possession in the defendant himself. |
| 8. Possession necessary, as well as sufficient. | 19. <i>Constructive</i> possession; acts of ownership; deed; sale of personal property; constructive delivery; purchase by agents. |
| 9. Title and right of possession when sufficient. | 32. Possession in case of <i>execution</i> . |
| 10. Possession in case of <i>joint</i> ownership. | 34. <i>Constructive</i> yields to <i>adverse</i> possession. |
| 11. Part possession. | 35. Action by one <i>ousted</i> or <i>disseized</i> . |
| 12. <i>Defence</i> on the ground of possession. | |
| 13. Or want of possession. | |

1. UNDERLYING the entire superstructure of property in general, which was considered in the last chapter, and indeed constituting the original foundation of all property, and therefore for the most part an essential incident to the class of wrongs which we are about to consider, is the elementary fact of *possession*; which therefore, in its connection with torts, requires to be very distinctly explained.

2. That possession, so far as wrongs are concerned, is vitally involved in the idea of property, appears from the very classification of wrongs, already referred to, (p. 2.)

into wrongs to things in *possession* and to things in action. Thus it is said,¹ "Property in chattels personal, may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former or property in *possession*, is divided into two sorts, an absolute and a qualified property." The same writer remarks:² "Actual possession is, *primâ facie*, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good."

3. It will be seen, of course, that *the nature* of possession depends much upon the nature of the subject of it; as in case of real and personal property, generally; and, more especially, that possession of an easement, for example, does not require possession of the corporeal property to which such easement appertains, but only a present right of enjoying the easement. So it will be seen, that possession involves very different rights and liabilities as between the possessor and a mere stranger or wrongdoer, and as between such possessor and one having the right of property, present or future, in the same subject-matter. (a)

4. With these preliminary explanations, we proceed to consider the subject of *possession*, as affecting torts or wrongs to property.

5. It is the general rule—applicable alike to real and personal property (b)—that possession is both sufficient

¹ 2 Bl. Com. 389.

² *Ib.* 196.

(a) See *Reversion, Landlord, Action on the Case, Waste, Nuisance*.

(b) The only distinction between real and personal property in reference to this particular point is thus expressed: "The immediate right to real

and necessary to maintain an action for a tort or wrong; more especially that "bare possession gives a right as against a wrongdoer, for the invasion whereof an action of *trespass* will lie."¹ (a)

6. Thus it is held, that he who is in actual possession of land, whether he have a title or not, may maintain trespass against any other person except the real owner or him who has the right of possession.² More especially if the plaintiff's possession is *peaceable and exclusive*.³ So one in possession of land at the time of an injury to it may maintain trespass for the injury, though out of possession at the time of suit brought.⁴ So it is held that a prior possession of land, accompanied with acts of ownership, *by one through whom the plaintiff deduces title*, will authorize a recovery against a defendant, who is afterwards found in possession, without title or claim to the premises.⁵ And resumption of possession, by the rightful owner, will not defeat the prior wrongful possessor's action of trespass against a stran-

¹ Per Ashurst, J., *Smith v. Milles*, 1 *ilton v. Marquis*, &c. 3 *Ridg.* 267. See *T. R.* 475; *Outcalt v. Durling*, 1 *Dutch.* 443. *Murldrow v. Jones*, 1 *Rice*, 64; 1 *Pike*, 448.

² *Brown v. Manter*, 2 *Fost.* 468; *Inhabitants, &c. v. Thacher*, 3 *Met.* 239; *Johnson v. McIvain*, 1 *Rice*, 368; *Ham-*

³ *Palmer v. Aldridge*, 16 *Barb.* 131.

⁴ *Smith v. Ingram*, 7 *Ired.* 175.

⁵ *Cox v. Davis*, 17 *Ala.* 714.

property must be vested in one person only; whereas a special property, in the case of personalty, may be in one, as in the instance of carriers, while the absolute right to it may exist in another. When a competition arises between those two persons, the right of the latter must prevail; but, as against all other persons, a special property is sufficient." Per *Ld. Kenyon*, *Webb v. Fox*, 7 *T. R.* 396.

(a) The general rule is sometimes expressed in the qualified form, that, to maintain *trespass*, either in case of real or personal property, the plaintiff must show in himself either actual or constructive possession, or the immediate right of possession, at the time of the tortious entry or taking. Otherwise the remedy of the owner is *case* or *trover*. *Davis v. Young*, 20 *Ala.* 151; *Brown v. Thomas*, 26 *Mis.* 335; *Heath v. West*, 8 *Fost.* 101; *Halligan v. Chicago, &c.* 15 *Ill.* 558; *Hoyt v. Gelston*, 13 *Johns.* 141, 561; *Dunham v. Stuyvesant*, 11 *Johns.* 569.

In New York a declaration in *replevin* must allege that the goods and chattels replevied were *the property* of the plaintiff. It is not sufficient for

ger.¹ And the identity of the close and possession may be established, by any person who knows the lines and corners, or who can prove the plaintiff's possession.² So, where both parties rely merely on a possessory title, a contract by one to purchase the land of the owner is admissible in evidence, for the purpose of showing the character of the possession.³ (a) Upon the same principle, possession of per-

¹ *Cutts v. Spring*, 15 Mass. 235.

² *Moore v. Moore*, 8 Shep. 350.

³ *Leadbetter v. Fitzgerald*, 1 Pike, 448.

the plaintiff to say that they were taken by the defendant out of his possession, and that he was entitled to the possession of them. *Bond v. Mitchell*, 8 Barb. 804. (See *Replevin*.)

An action upon the case cannot be maintained by one who has the legal title and right of possession to land, against a person who enters upon such land, cuts timber, and commits other trespasses. *Robertson v. Rodes*, 18 B. Mon. 325.

(a) An acknowledgment in writing of the demandant's title, made by the tenant in a writ of entry, is sufficient evidence of such title to be submitted to the jury, in a subsequent action of trespass brought by the demandant against the tenant for an entry on the land. *Kellenberger v. Sturtevant*, 7 Cush. 465.

So where the defendant entered under the plaintiff's title, as a purchaser in fee, he is not compelled to go beyond the source from which both the plaintiff and himself derive title, but he may produce evidence of any independent title, if he can do so. *Hill v. Robertson*, 1 Strobb. 1.

So the verdict in one action of trespass is evidence, in another between the same parties, of the plaintiff's possession at that time; and his possession will be presumed to continue, unless the contrary appear. *Stean v. Anderson*, 4 Harr. 309.

A lease, including part of the premises in dispute, from the plaintiff's devisor to the defendant, which had expired several years before the suit was commenced, was held to be such an admission of the plaintiff's title, as at least to throw upon the defendant the burden of showing a paramount title. *Gourdin v. Davis*, 2 Rich. 481.

Where, in an action of trespass for cutting trees, the plaintiff, without introducing any paper title, proved, by the oral testimony of two witnesses, that the land on which the trespass was committed belonged to him, and the testimony was not objected to at the time; it was held, that the defendant had no right afterwards to ask the Court to instruct the jury, that the title

sonal property under a general bailment is sufficient to maintain trover against a stranger. Where, therefore, the owner of furniture let it in writing to the plaintiff on hire, and he placed it in a house occupied by the wife of a person who had become bankrupt, and it was seized by order of the assignees; held, the plaintiff might recover in trover, without producing the agreement.¹ And, in case of actual possession, the right of property is held immaterial. (a) Or an allegation

¹ *Burton v. Hughes*, 9 Moore, 334.

to the land was not sufficiently proved, on account of the want of documentary evidence. *Clay v. Boyer*, 5 Gilm. 506.

The relative bearing of possession and property upon the rights of the parties may be modified by the *pleadings*. Thus, to a declaration in trespass, charging that the defendant broke and entered the plaintiff's workshop while the plaintiff was inhabiting and present in it, and, while the plaintiff was so inhabiting and present, pulled it down; the defendant pleaded, that the workshop was the defendant's, and not the plaintiff's. Held, that, on issues joined upon these averments, it was immaterial whether the plaintiff was or was not inhabiting and present at the time of the alleged trespass; and that the defendant was entitled to the verdict, upon proof that he had a right to the soil. *Burling v. Read*, 11 Ad. & Ell. N. S. 904.

So, on the trial of the issue of property in the plaintiff, it is not necessary for him to prove that the defendant took the property out of his possession. *Kerley v. Hume*, 8 Monr. 181.

Where the evidence shows conclusively that the title to the property claimed is in the plaintiff, it is error to submit the question of title to the jury. *Fullam v. Cummings*, 16 Verm. 697.

(a) The ancient legal maxims upon the subject still maintain their original authority:—“*In pari causa possessor potior haberi debet.*” “*Pro rei possessore in dubio est pronuntiandum.*”

It has been sometimes held, that *trover* is founded exclusively on the right of *property*. *Hastler v. Skull*, 1 Tayl. 152.

Or, at least, cannot be maintained without a property in the plaintiff, either general or special. *Hotchkiss v. M'Vickar*, 12 Johns. 403; *Sheldon v. Soper*, 14 Ib. 352; *Glaze v. M'Million*, 7 Port. 279; *Taylor v. Howall*, 4 Blackf. 317; *Barton v. Dunning*, 6 Ib. 209; *Grady v. Newby*, Ib. 442.

Or a right of property and of possession. *Redman v. Gould*, 7 Blackf. 361; *Danley v. Rector*, 5 Eng. 211; *Kemp v. Thompson*, 17 Ala. 9; *Purdy v. M'Cullough*, 3 Barr, 466.

of property is *proved* by possession, more especially if coupled with a qualified interest.¹ Hence, where, to a declaration for

¹ *Outcalt v. Durling*, 1 Dutch. 443.

And the distinction has been made, that, though in trespass the defendant cannot show property or a paramount title in a stranger, it is otherwise in trover. *Cook v. Howard*, 13 Johns. 276.

And that he might prove it even by the admission of the plaintiff. *Glenn v. Garrison*, 2 Harr. 1.

The rule, however, may now be considered as well settled, that, in both these forms of action alike, possession is in general sufficient and necessary as against a stranger or wrongdoer. In other words, possession constitutes or proves property, until a better title is shown. See 2 Greenl. Ev. § 637; *Mount v. Cubberly*, 4 Harr. 124; *Barwick v. Barwick*, 11 Ired. 80; *Knapp v. Winchester*, 11 Verm. 351; *Fairbanks v. Phelps*, 22 Pick. 535; *Allen v. Smith*, 10 Mass. 308.

Thus a declaration in trover, not alleging possession by the plaintiff as of his own property, is held bad even after verdict. *Sevier v. Holliday*, 1 Hemp. 160.

Whether a mere *servant* can maintain any action for injury to property in his possession, will be considered hereafter. See *Master, &c.* See also Story on Bailm. § 93, g. h. i.; *King v. Dunn*, 21 Wend. 253.

But a consignee, receiving goods merely for transshipment, has a sufficient interest to maintain trover. *Fitzhugh v. Weiman*, 5 Seld. 559.

And a general *bailee*, without hire, may maintain trover for property taken from his possession, against all persons but the rightful owner. *Faulkner v. Brown*, 13 Wend. 63.

And, on the other hand, such action does not lie in favor of the bailor. Thus, where a horse, hired for a given time, is levied on, before the expiration of the time, and sold under an execution against the bailee; the general owner cannot maintain trover against the sheriff, either before or after the determination of the bailment. *Caldwell v. Cowan*, 9 Yerg. 262.

It is held, however, that, to maintain trover by virtue of a special property, one must have an absolute vested interest. *Tuthill v. Wheeler*, 6 Barb. 362.

Case may be maintained, where trover might not lie, for want of possession. Thus the plaintiff, the owner of a factory and the machinery in it, gave a bond to S., conditioned to convey them to S., when certain negotiable notes, given as the consideration, should be paid; and that S. should have possession so long as he continued to pay the notes as they became due, and no longer. Possession was delivered immediately, pursuant to the bond. Before the first note became due, the machinery was attached as

breaking and entering the plaintiff's close, the defendant pleaded, 1st, not guilty; 2d, that the close was not the close

S.'s property, and removed from the factory by the officer, who before the removal had full notice of the plaintiff's title, and the machinery was afterwards sold on execution. The plaintiff then brought an action against the officer, in which the declaration contained counts in trover and case. Held, case might be maintained, and the measure of damages was the value of the machinery as it stood in the factory before its removal. It was doubted whether trover could be supported, although it *seems* that, if S. himself had removed and sold the machinery, trover would lie against the vendee. *Ayer v. Bartlett*, 9 Pick. 156.

The general owner has a constructive possession, as against his bailee or tenant, who, having a special property, has violated his trust by destroying that which was confided to him. 2 Greenl. Ev. § 615.

And it has been recently held, that, if the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage; the bailor may maintain an action of trespass therefor against him. *Stanly v. Gaylord*, 1 Cush. 536.

Either in trover or trespass against a stranger, one having a special property may recover the whole value, holding the balance beyond his own interest in trust for the general owner; but, if the suit be against the latter, he is entitled to a deduction of the value of his interest. *King v. Dunn*, 21 Wend. 253.

With regard to the relative nature of the two actions, trespass and trover, it may be further remarked, that, where damages are given in trespass for the value of goods destroyed or lost, the verdict and recovery may be pleaded in bar to an action of trover for the same trespass or conversion. *Sanders v. Egerton*, 2 Brev. 45.

As already explained, the term *possession* may bear a peculiar meaning, when applied to mere incorporeal rights or qualified privileges. A few examples, however, may illustrate the application of the general principle stated in the text to this kind of property.

In a possessory action for an injury to an *easement*, the plaintiff need not set out his title, unless the defendant appears to be tenant of the land. But, if he offers to do it, and sets out an insufficient title, it will be bad. *Dorney v. Cashford*, 1 Ld. Raym. 266.

Where A. grants liberty, license, power, and authority to B., and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll; the property in the materials of the bridge, when built and dedicated to the public, still con-

of the plaintiff; 3d, that the close was the soil and freehold of the defendant; held, that evidence of possession was

tinues in B., subject to the right of passage by the public; and, when severed and taken away by a wrongdoer, he may maintain trespass for the asportation. *Harrison v. Parker*, 6 E. 154.

So the contractors for making a navigable canal, having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrongdoer. *Dyson v. Collick*, 5 B. & Ald. 600.

So one who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *quare clausum* against any person entering the close and taking the grass, even with the assent of the owner. *Crosby v. Wadsworth*, 6 E. 602.

So it is not necessary, in order to maintain an action for the destruction of stacks of grain and hay by reason of a fire set by the defendant, that the plaintiff should be the owner of the freehold where such stacks were standing. *Armstrong v. Cooley*, 5 Gilm. 509.

So, where the owner of land rented it to another to raise a crop of corn thereon; and, before the crop was gathered, the owner sold it, and the purchaser turned a number of hogs into the field; held, this was a trespass on his part. *Rodgers v. Lathrop*, 1 Smith, 347.

But it is held, that, though an action of trespass *quare clausum* may be sustained upon a temporary interest in the plaintiff, it must be an entire or exclusive interest. Thus a right of ingress and egress in an outgoing tenant, after the determination of his lease, for the purpose of gathering and taking away the growing crops, will not enable him to maintain trespass against the succeeding tenant; who has a right to seed down the field on which such crop stands before it comes to maturity. *Dorsey v. Eagle*, 7 Gill & John. 321.

And, on the other hand, in the case of carrying on a farm *at the halves*, the owner of the farm is not so far divested of the possession, that he may not maintain trespass in his own name for any injury to the inheritance. As to the growing crops, in which the parties have a joint interest, they should join in the action. But, where the tenant in such case disclaimed all occupancy of a portion of the land, in reference to which a controversy existed between the owner of the land and a third person, and refused to take possession of it, it was held, that the owner of the land might sue in his own name for an injury to the crops upon such portion. *Cutting v. Cox*, 19 Verm. 517.

sufficient to entitle the plaintiff to a verdict on the second plea.¹ And a mere possessory right to personal property,

¹ *Heath v. Milward*, 2 Bing. N. R. 98.

In trover for ore brought by lessees of a mine, it is sufficient, under a plea of "not possessed," to show occupation of the mine, without proving title in their lessor. *Taylor v. Parry*, 1 Man. & Gran. 604.

So, in an action on the case for disturbance of common, it is not necessary for the declaration to state title to the common; but only that the plaintiff was possessed of a tenement, &c., and had a right of common in the place where, &c. *Strode v. Byrt*, 4 Mod. 418.

But where one is seized in fee of a close, upon which certain burgesses have a right, during a portion of the year, to depasture their cattle, and have, during that period, exclusive possession of the close; he may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes; though not against one who merely rides over the close. *Cox v. Glue*, 5 Com. B. 583.

A party claiming ownership in a field granted to the plaintiff a parol license to search therein for minerals. The plaintiff, acting under this license, dug pits in the field and threw up sand and gravel, mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel, and ore, the party who gave the plaintiff the parol license granted him a similar license by deed. Held, the plaintiff was entitled to maintain trover for the sand, &c. *Northam v. Bowden*, 32 Eng. L. & Eq. 559.

It will be seen hereafter,—see *Watercourse, Mill*, chap. 12,—that one of the most important incorporeal rights known to the law is that of a *watercourse*. But, notwithstanding the peculiar nature of this privilege, which ordinarily makes an injury done to it a proper subject of an *action on the case*, which is not a possessory action; the general rule stated in the text is still held to be applicable.

Actual possession, under claim of title, is sufficient to sustain an action on the case for diverting water from a mill, or for overflowing land; and therefore evidence, showing that the plaintiff had no title to the land on which the mill was situated, is inadmissible. *Bromer v. Merrill*, 2 Chandl. 46; *Kimball v. Walker*, 7 Rich. 422.

So the right of a person to the enjoyment of a water privilege, of which he is in the quiet use or possession, cannot be questioned, by one who shows no adverse claim. *Howard v. Ingersoll*, 17 Ala. 780.

So, where one has acquired a right to flow the water from his mill through the land of another, temporarily, by his mere license or permission, and

though the title be in another, has been held sufficient to maintain even an action on the case. Therefore, if the general issue be pleaded to an action on the case for taking the plaintiff's goods, it will not be sufficient for the defendant to show that the plaintiff had no property in them, if he had possession.¹ And in an action on the case for an injury relating to real estate, against a stranger, the plaintiff

¹ *Templeman v. Case*, 10 Mod. 25.

entered upon the exercise of the right; he may maintain an action against another for obstructing his right. *Case v. Weber*, 2 Cart. 108.

So an action to recover damages for diverting water from land must be brought by the person in possession. *Rathbone v. McConnell*, 20 Barb. 311.

So, though a statute authorize the building of dams in navigable streams by the "owners" of adjoining lands; in an action for an injury to the plaintiff's mill, by the backing of the water, by means of a dam of an inferior proprietor, the declaration need not aver that the plaintiff was an "owner of adjoining lands;" but an averment that he was "lawfully possessed of the mill and water-power" is sufficient, and even more than sufficient, as possession is all that can be required. *Bigler v. Antes*, 21 Penn. 288.

But although, in an action for flowing land by a party in possession, his title cannot be disputed for the purpose of defeating the action; for the purpose of ascertaining the amount of injury, the nature and character of the plaintiff's interest may be inquired into. *Bassett v. Salisbury, &c.* 8 Fost. 438.

In accordance with another distinct branch of the general rule upon this subject, (§ 12), in an action on the case for diverting water from a mill, it is not sufficient for the defendant to show an outstanding right in some third person, to take the water for the use of the premises occupied by the defendant, paramount to the plaintiff's right to the water, without showing title from such third person to himself. *Rogers v. Bancroft*, 20 Verm. 250.

But it is held, that a plaintiff cannot recover for injury done his land by the erection of a milldam, where paramount title is shown in another by his own evidence. *Morris v. M'Carney*, 9 Geo. 160.

And, in an action on the case for diverting a watercourse from the lands of the plaintiff, his possession is sufficiently alleged by an averment, that at the time of the commission of the wrongs he was "seized in his demesne as of fee;" seizin in law being sufficient, and the diversion being an injury both to the freehold and the possession. *Hart v. Evans*, 8 Barr, 13.

need not show title in himself; though it is otherwise where an owner of the soil is the defendant.¹ (a) So a tenant at will, in actual possession of the land, may maintain trespass *quare clausum* against a stranger, for cutting and carrying away trees.² And mere prior occupancy of land, however recent, and without property, gives a good title to the occupant, whereon he may maintain trespass against all the world, except such as can prove an older and better title in themselves.³ So, in an action on the case against a wrongdoer, the plaintiff, if in possession, need not set forth whether he has a title by grant or prescription; for that goes to the right.⁴

7. The same principle is still further illustrated or extended by the rule, that actual possession, *whether rightfully or wrongfully obtained*, is a sufficient title against a mere stranger or wrongdoer.⁵ (b) Thus a possession of lands, as open or exclusive as the nature of the land will admit, operating a disseizin of the true owner, will enable the disseizor to maintain trespass against a mere wrongdoer, even though

¹ Stroud v. Birt, 1 Com. 7.

² Hayward v. Sedgley, 2 Shep. 439.

³ Catteris v. Cowper, 4 Taunt. 547;
Walter v. Rumball, 4 Mod. 392.

⁴ Hebblethwaite v. Palmes, 3 Mod.

51, 52; S. P. Langford v. Webber, 3 Mod. 132.

⁵ Carter v. Bennett, 4 Florida, 283;
Linnard v. Crossland, 10 Tex. 462;
Knapp v. Winchester, 11 Verm. 351.

(a) Although possession, without proof of title, is sufficient to maintain an action, yet, in an action of trespass *quare clausum*, under the general issue of not guilty, the plaintiff is not bound to rely upon the mere fact of possession, but may also prove the legality thereof, and his title to the premises, and so entitle himself to greater damages. *Hunter v. Hatton*, 4 Gill, 115.

(b) See chapter 4. The same principle applies to a defence as to an action. Thus, if a slave be given to the donee verbally, and possession pass with the gift, though the gift be void by statute, the donor cannot maintain trover therefor against the donee without a previous demand and refusal. *Duckworth v. Overton*, 1 Swan. 381.

So, if the plaintiff in trespass *quare clausum* shows no title, he cannot object that a deed under which the defendant claims title and holds possession is invalid. *Brown v. Pinkham*, 18 Pick. 172.

such possession has continued less than twenty years.¹ So one in possession of glebe land, under a lease void by Stat. 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrongdoer.² So, in trespass by one claiming title under proprietors of common land, the defendant, who shows no title, cannot defend, on the ground that the plaintiff took no title, by reason of informality in the proceedings of the proprietors in making the grant.³ So the finder of a jewel, though he does not acquire an absolute property or ownership, may maintain trover therefor against any person, not the rightful owner.⁴ And on the other hand it has been held, that, if goods are lost, there can be no possession, upon which there can be a trespass.⁵ So, where an execution creditor purchases the goods levied on, though such purchase may be of questionable validity, yet he has, by virtue of the levy and the possession, such a special property in the goods, that he may maintain trover for them.⁶ So, where a sheriff, by virtue of an attachment, seized goods, and delivered them to the plaintiff to be taken out of the district and sold; held, though the delivery to the plaintiff was irregular, yet he might maintain trover against a wrongdoer, who took the goods out of his possession.⁷ So the title of a deputy sheriff, in personal property seized by him on execution, is sufficient to maintain trespass against a stranger for a tortious disturbance in his possession of it; notwithstanding his failure to sell the property at the time advertised.⁸ So a statute provided, that all pressed hay offered for sale should be branded in a prescribed way, and imposed a penalty upon any person who should offer for sale any bundle not so branded. The plaintiff agreed with the town, which

¹ *Clancey v. Houdlette*, 39 Maine, 505; *Clark v. Malory*, 3 Harring. 68.
² *Moore v. Moore*, 8 Shep. 350; *See Wyman v. Hurlburt*, 12 Ohio, 81.
³ *Myrick v. Bishop*, 1 Hawks, 485; *Richardson v. Merrill*, 7 Mis. 333; *Webb v. Sturtevant*, 1 Scam. 181.

⁴ *Graham v. Peat*, 1 E. 244.

⁵ *Dolloff v. Hardy*, 26 Maine, 545.

⁶ *Armory v. Delamirie*, 1 Strange,

⁷ *Bank of Kentucky v. Shier*, 4 Rich. 233.

⁸ *Gibbs v. Chase*, 16 Mass. 125.

owned certain hay, while it was stored, and before it was pressed, to purchase it, delivered in pressed bundles, at a certain price, the weight to be ascertained after it was pressed; and the town agreed to deliver it when pressed. It was pressed and delivered accordingly, and the price paid by the plaintiff; but the brands were not upon the bundles. Held, the plaintiff's possession was sufficient to enable him to maintain trover for the hay against a wrong-doer.¹ So a suit lies for injuring a mill by obstructing a stream, though the mill-dam is a public nuisance.² So, where the plaintiff bought and paid for a ship stranded on the English coast, but the transfer was not regular; and he tried to save her, but she went to pieces; and the defendant possessed himself of parts of the wreck, which drifted on his farm; held, the plaintiff's possession enabled him to recover for them in trover.³ (a)

¹ Bartlett v. Hoyt, 9 Fost. 317.

² Sutton v. Buck, 2 Taunt. 302.

³ Haller v. Pine, 8 Blackf. 175;
Simpson v. Searey, 8 Greenl. 138.

- (a) See chapter 4. The same principle applies to a defence as to an action. Thus, if a slave be given to the donee verbally, and possession pass with the gift, though the gift be void by statute, the donor cannot maintain trover therefor against the donee without a previous demand and refusal.
- Duckworth v. Overton, 1 Swan. 381.

So, if the plaintiff in trespass *quare clausum* shows no title, he cannot object that a deed under which the defendant claims title and holds possession is invalid. *Brown v. Pinkham*, 18 Pick. 172.

And this principle more especially applies, where the defendant's interference with the property was in its nature official, and occurred during an interruption of the plaintiff's title.

The vessel of the plaintiff was seized by A., an officer of the customs, under the revenue laws, and was directed by the collector to be detained; and, during the detention, the defendant, another officer interested in the seizure and conscious of the facts, used the vessel with the consent of the plaintiff, for his private purposes, and afterwards restored her to the plaintiff. The vessel was afterwards acquitted in the District Court, and a certificate of probable cause of seizure granted by the Judge, but the plaintiff refused to receive the proceeds of the vessel, which had previously been sold under an order of the Court. In an action of trespass, held that the defendant, not being implicated in the first taking, either as an actor, or standing in such

8. While possession is *sufficient*, it is also in general *necessary*, to maintain an action for tort. Thus, to maintain trespass *quare clausum*, the plaintiff must have either a title or exclusive possession, and there must be no adverse possession in any other person.¹ So, in trespass *de bon. asport.*, the plaintiff must have had, at the time of the trespass, the actual or constructive possession of the goods, or at least a general or special property in them and a right to the immediate possession.² And the general owner of goods cannot sustain either trespass or trover, when there is an outstanding possession in another, accompanied with a special property.³ And one who has never had actual possession of personal property, and is not the general owner, though he may have a special property, cannot maintain replevin or trover against another in the actual custody of the property.⁴ So an officer, in whom a right to the custody of chattels is vested by act of parliament, has not, in respect of such right merely, such a property in them, as will enable him to maintain an action for the wrongful detention of them. Thus parish officers, or other persons, by whom parish books, &c., are appointed by the inhabitants in vestry assembled to be kept, cannot bring trover against an ex-warden for the books of accounts, assessments, &c., kept by him during the period in which he was in office, and with the possession of which he has never parted.⁵ So, where a colonel had purchased horses for government, and, being approved of by the proper inspecting

¹ Cong. Society v. Baker, 15 Verm. 119; Payne v. Clark, 20 Conn. 30.

² Hume v. Tufts, 6 Blackf. 136; Cannon v. Kinney, 3 Scam. 9; M'Farland v. Smith, Walk. 172; Bell v. Monahan, Dudley, 88; Dallam v. Fidler, 6 W. & S. 323; Edwards v. Edwards, 11 Verm. 587; Lunt v. Brown,

1 Shep. 236; Freeman v. Rankins, 8 Ib. 446; Barron v. Cobliegh, 11 N. H. 537; Potter v. Washburn, 13 Verm. 558; Hoyt v. Van Alstyne, 15 Barb. 568.

³ Bourne v. Merritt, 22 Verm. 429.

⁴ Holiday v. Lewis, 15 Mis. 403.

⁵ Addison v. Roud, 6 Nev. & M. 422.

relation to the plaintiff as would make him a party to the seizure, could not be made a trespasser *ab initio*; and that the plaintiff had not, after the seizure, and when the defendant made use of the vessel, the possession of her or a right to reduce her to his actual possession, which was essential to maintain an action of trespass. Van Brunt v. Schenck, 11 Johns. 377.

officer, they were sent under the care of a sergeant to the receiving depot for his Majesty's use; held, the colonel had not such a special property, as to maintain trover for one of them, which was taken out of the possession of the sergeant as a distress for a turnpike toll.¹ (a) So a party, who let his house ready furnished, cannot maintain trespass against the sheriff for taking the furniture under an execution against the lessee, though notice were given that the goods belonged to the plaintiff; because trespass is founded on a tort done to the possession.² So in trover by a guardian, if the declaration allege that the property claimed, being in the possession of his ward, was lost, &c., it is bad on demurrer, in not showing that the guardian was entitled to the possession.³ So the plaintiff, a sheriff, made a levy on personal property of the defendant, and left it in possession of two other persons, taking from them a paper under seal, by which they acknowledged the receipt of the property, agreed to deliver it at a specified time and place, and, on failure thereof, authorized a confession of judgment against them for the amount of the debt and costs in the suit and the cost of the writ. Held, that trespass would not lie for taking away the property before the time for delivery had expired, because until that time the plaintiff was not entitled to possession.⁴

9. But it is to be further distinctly stated, as already suggested, that a person having the title to real estate, without

¹ *Hopkinson v. Gibson*, 2 J. P. Smith, 202.

² *Dearman v. Dearman*, 5 Ala. 202.

⁴ *Lewis v. Carsaw*, 15 Penn. 31.

³ *Ward v. Macauley*, 4 T. R. 489.

(a) A. B. owed the sum of £4 11s. 1½d. to the prosecutor, and, the latter having demanded payment, the prisoner said he would settle with him on behalf of A. B. He took out of his pocket a piece of paper, stamped with a sixpenny stamp, and put it on the table, and then took out some silver in his hand. The prosecutor wrote a receipt for the sum mentioned on the stamped paper, and the prisoner took it up and went out of the room. On being asked for the money, he said "it is all right," but never paid it. Held, that this was not a case of larceny, the prosecutor never having had such a possession of the stamped paper as would enable him to maintain trespass. *Regina v. Smith*, 9 Eng. L. & Eq. 532.

actual possession, but with *a right of immediate possession*, and there being no adverse possession, can maintain trespass.¹ Thus a declaration in trespass for entering and cutting timber on the plaintiff's close need not aver that he was in possession.² So trespass lies on behalf of the United States against one cutting and carrying away timber from the public lands.³ So there can be no adverse possession as against the United States. And, on the sale of lands by the United States, the patent transfers to the purchaser the entire legal estate and seizin, to as full an extent as the government held them.⁴

10. The question sometimes arises, as to the rights and liabilities growing out of a *joint* possession, either in reference to joint owners themselves, or as between a portion of them and third persons. (a) Where two parties have a concurrent or mixed possession of land, neither having any other title, nor any exclusive priority of possession, one of them cannot maintain trespass against the other. Thus a town took possession of a tract of uninclosed land to which it had no title, and forbade all persons to take cranberries therefrom, except on terms which were prescribed by the town, and with which most persons complied for several years. Before the town took possession, H. had claimed a right in the land, although he could not show any title, and had taken cranberries growing thereon, and continued to take them afterwards under a claim of right. Held, that the possession of H. and of the town was mixed or concurrent, and that the town could not maintain trespass against persons who took cranberries from the land under a license from H.⁵ So where a precinct, owning a meeting-house, became upon their own application incorporated into a town, after which for thirty-

¹ *Smith v. Yell*, 3 Eng. 470; *Mason v. Lewis*, 1 Iowa, 494; *Davis v. Bourg*, 20 Ala. 151; *Brown v. Ware*, 25 Maine, 411; 2 Gilm. 652; *Payne v. Clark*, 20 Conn. 30; *Dejarnett v. Haynes*, 23 Miss. 600; *Clark v. Draper*, 19 N. H. 419.

² *Gray v. Cooper*, Wright, 500.

³ *Cotton v. The United States*, 11 How. 229.

⁴ *Cook v. Foster*, 2 Gilm. 652.

⁵ *Inhabitants, &c. v. Thacher*, 3 Met. 239.

(a) See *Joint Owners, Tenants in Common*.

five years the meeting-house and all parochial affairs were under the sole management of the town, but, from some proceedings of the town, such as exempting certain inhabitants from taxes for the support of public worship, it could be inferred that the town acted with reference to the continued existence of the precinct, and as their agent: it was held that the precinct might reorganize themselves; that the meeting house continued to be their property; and that, while they had the control of it, and the occupation of it for the purposes for which it was built, the use of it for municipal purposes did not give such an exclusive possession, as would enable the town to maintain an action of trespass against any person for pulling down the meeting-house by the authority of the precinct.¹ So, where two persons cultivated a crop of corn, in a field to which each claimed but neither had a title, and of which neither had the actual possession; and one of them afterwards gathered the corn, piled it in heaps, and left it for a week; held, he did not thereby acquire such an exclusive possession of the corn, as to enable him to maintain an action against the other for removing it.² But it is said, "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession? I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respects."³ And where one is part owner of personal property, and has the possession and control over it, with power to sell, he may maintain trover in his own name against a wrongdoer who converts it.⁴ (a)

¹ *Milford v. Godfrey*, 1 Pick. 91.

² *McGahey v. Moore*, 3 Ired. 35.

³ Per Maule, J., *Jones v. Chapman*,

2 Exch. 821.

⁴ *Hyde v. Noble*, 13 N. H. 494.

(a) In case against the owners of a steamer for negligence, whereby buildings were fired, the declaration contained three counts; in one of which the plaintiff counted on his own seizin; in the second, on his seizin and possession; and in the third on his possession. The plaintiff having

11. Questions also arise as to the effect of possession of only a *part of the property* upon the title to the whole. And

shown title in himself to seven eighths of the property injured, and actual possession of the whole, it was held, that, for the purpose of showing to what damages he was entitled under the third count, he might show that he held the remaining eighth under a valid contract to purchase, and therefore that the admission, as evidence, of a deed of such eighth part, bearing date subsequent to the injury complained of, as it could not prejudice the defendant, was no ground for reversal of the judgment. *Schenck v. Cuttrell*, 1 New Jersey, 5.

Trespass for assault. Plea, that the plaintiff was wrongfully and unlawfully in a certain close of the defendant, Bagge, without, &c., whereupon the said defendant, and the other defendant, as his servant, and by his command, requested the plaintiff to depart, and because, &c., (justifying the assault). Plea, also, that before, &c., eleven members of a certain cricket club, called the Lynn Club, to wit, &c., and eleven members of a certain other cricket club, called the Litcham Club, to wit, &c., were lawfully possessed of a certain close, and were lawfully playing a game of cricket in and upon the said close; that the plaintiff was wrongfully and unlawfully in and upon the said close, and interrupted, &c., the playing, &c., whereupon the defendant, Bagge, in his own right, and by the command and authority of the ten other members of the Lynn Club, and the said eleven members of the Litcham Club, requested the plaintiff to depart out of the said close, and to desist from interrupting the playing of the said game, which the plaintiff refused to do; whereupon the defendant, Bagge, in his own right, and by the command, &c., and the other defendant, as the servant, &c., removed the plaintiff from and out of the said close, &c. Replication, to the first of the above pleas, that the same close was the close and soil of the plaintiff together and along with the said Bagge and the other members of the Lynn Club, as joint tenants thereof, and that the plaintiff was then as such joint tenant possessed, &c., and that the defendant, Bagge, had nothing in the said close except as joint tenant with the plaintiff, &c. And as to the other plea, *de injuria*. It appeared at the trial, that, whilst the game was being played between eleven members of the Lynn Club, (the defendant being one,) and eleven members of the Litcham Club, the plaintiff, who was a member of the Lynn Club, but not one of the eleven players, took the place of one of the players, and thereupon a misunderstanding arose, which led to the assault complained of, in the forcible removal of the plaintiff from off the space of ground upon which the match was played, and which was tabooed off for the purposes of the game, and within which only the players were properly at liberty to go. The close in question was occupied, at an annual rent, under an agreement between the

upon this subject the rules are; that proof of an entry into part in the name of the whole is sufficient; as where one, having half entered at the window, was forcibly dragged out:¹ although possession by the owner of part of a tract of land is the possession of the whole tract, only so long as no other person is in the actual adverse possession of any part; and, as soon as another takes possession of any part, either with or without title, the former possessor loses the possession of that part, and cannot maintain trespass for any act done on such part, while he is thus out of possession of it.² (a)

¹ 3 Stark. Ev. 1193; Bro. Seisin, 20, ² Ring v. Ring, 4 Dev. & Batt. 164. 23.

owner of the soil and the Lynn Cricket Club, of which the defendant, Bagge, was the president. A verdict was found for the plaintiff. Held, that the agreement established the issue on the first plea, as to the plaintiff's joint possession. Also, that the issue on the other plea was properly found for the plaintiff, the ground of justification being, that the twenty-two members of the Lynn and the Litcham Clubs were possessed of the close, and that the trespass had been committed in the exercise of such right. *Holmes v. Bagge*, 18 Eng. L. & Eq. 406.

(a) Upon a similar principle, in trespass *quare clausum*, although it is necessary to prove all the abutments of the close as laid in the declaration, it is not necessary to show a title to, or possession of, the whole close, but only such part as includes the trespass. *Wheeler v. Rowell*, 7 N. H. 515; *Tyson v. Shurry*, 5 Md. 540.

So, where the declaration alleges, that a trespass was committed upon a close described as "Greyhound Forest," the plaintiff need not prove the boundary lines of the whole tract, if he shows himself in possession of a part. *Tyson v. Shurry*, 5 Md. 540.

So if a party at the same time enter upon two or more closes, he may be treated as guilty of but one trespass, and a recovery may be had for the whole injury upon one count. *Halligan v. Chicago*, &c. 15 Ill. 558.

But where the plaintiffs in an action of trespass against B., claiming title to a larger tract of land, which included the *locus in quo*, offered in evidence the record of a judgment in their favor against C., in an action of ejectment for such larger tract, for the purpose of showing an act of ownership by the plaintiffs in relation to the *locus in quo*; it was held that such judgment, being between different parties, and in relation to a different subject matter, was inadmissible. *Southington, &c. v. Gridley*, 20 Conn. 206.

Thus where, in a possessory action, the plaintiff claimed several parcels of land by purchase at a sale on execution, and the sheriff's deed; held, if the defendant was in possession of any one parcel, the plaintiff might recover all the parcels described in his declaration and the sheriff's deed.¹ And possession of part of a lot of land, with definite boundaries, under a written contract of purchase, not recorded, from one who has no title to the lot, is sufficient to extend, by construction, to the whole lot, so as to enable the occupier to sustain trespass against a stranger to all title, who cuts timber thereon; notwithstanding a provision in the contract, that the purchaser shall not cut timber until he has complied with the conditions of purchase.² So, to an action of trespass for cutting down and converting trees, which the defendant justified, upon the ground that they grew upon his soil and freehold, the plaintiff replied, that the trees were his freehold, and not the freehold of the defendant. Held, the replication was proved, by showing that they grew on a certain woody belt, fifteen feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed a part, belonging to different owners; that from time to time the plaintiff and his ancestors, at their pleasure, cut down for their own use the trees growing within the belt; that the several owners of the different closes enclosing the belt never felled trees there, though they felled them in other parts of the same closes; and that, when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced.³ So by his induction a parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it.⁴ So, if a vendor sell goods by sample, to be delivered to

¹ *Corwill v. House*, 6 Ala. 710.

² *Hunt v. Taylor*, 22 Verm. 566.

³ *Stanley v. White*, 14 E. 332.

⁴ *Bulwer v. Bulwer*, 2 B. & Ald. 470.

the vendee within a month, and take earnest, and within a month send them by his servant to the vendee's premises, and, when part are unloaded, the rest are distrained for toll; the delivery is complete, so that the vendee may bring trespass for the seizure.¹

12. Possession and the right of possession are of course no less available as a ground of *defence* than as a cause of *action*. Thus, in a plea of justification or excuse for an entry to abate a nuisance, caused by the flowing of certain land by the plaintiff's dam, it is sufficient, if the defendant allege that he was *possessed* of an undivided moiety of such land, without stating his title. The possession thus alleged must be taken to be lawful, and it seems he would have the right to abate, although his possession was only for a term.² So in trespass for taking cattle damage feasant, if the defendant justify under a lease, it is sufficient for him to say that he was possessed of the place where, &c., without stating a particular title.³ So a sale was made of a wagon, upon condition that the vendee should take it and use it, and, whenever he paid the purchase-money, it should become his property, but, if he did not pay for it, he should pay for the use of it; and it was accordingly delivered to him. Held, he became a lessee, with the right of possession until the wagon or the purchase-money should be demanded; and consequently the owner could not, before such demand, maintain trover against an officer, who had attached and sold the wagon on execution as the property of the vendee.⁴ (a) So, in an action of trespass *quare clausum*, a plea that the close was the close and soil of the defendant is not a plea of *liberum*

¹ Blakey v. Dimsdale, 6 Mod. 162, n.

² Searl v. Bunnien, 2 Mod. 70.

³ Great Falls Co. v. Worster, 15 N. H. 412.

⁴ Fairbank v. Phelps, 22 Pick. 535.

(a) The vendor having subsequently to the sale demanded payment, but accepted a part payment; held, he thereby impliedly waived any further payment at the time, and confirmed the sale subject to the condition. 22 Pick. 535.

tenementum; and the defendant has only to prove right of possession.¹ And any title, whether freehold or possessory, in the defendant, may be given in evidence, if such title shows that the right of possession was in the defendant, or not in the plaintiff.² So the defendant may, under the plea of the general issue, give in evidence *liberum tenementum*, or the right of possession in himself or those under whom he claims; if the right be general, and exclusive of any superior claim of the plaintiff as to the whole, or the same part, of the premises; and not confined to a particular purpose, such as the enjoyment of an incorporeal hereditament.³ (a) And it is a general rule, in actions of trespass to try title, that the plaintiff must recover on the strength of his own title, and not on the insufficiency of the defendant's.⁴ So a tenant of land, claiming title, and having a possession which gives him a lawful right to "betterments," is not liable as a trespasser *quare clausum*, for acts done by him on and to the land, during the time of the possession by which his right to betterments became matured.⁵ So, in a leading case relating to *fixtures*, (see chap. 9,) to trespass for breaking and entering, &c., and pulling down and taking away certain buildings, &c.; the defendant, as to the breaking and entering, suffered judgment by default, and pleaded *not guilty* as to the rest. Held, such plea was sustained, by showing that the building taken away, which was of wood, was erected by him, as tenant of the premises, on a foundation of brick, for the purpose of carrying on his trade, and that he still continued in

¹ *Millison v. Holmes*, 1 Cart. 45; *v. Keezecker*, 1 Morris, 338; *Millison v. Smith*, 55.

² *Floyd v. Ricks*, 14 Ark. 286.

⁴ *Hughes v. Lane*, 6 Tex. 289.

³ *Ferris v. Brown*, 3 Barb. 105; *Sage*

⁵ *Paine v. Morr*, 35 Maine, 181.

(a) Thus the defence, that the *locus* is a public highway, raises a question of title, which cannot be tried before a justice. *Randall v. Crandall*, 6 Hill, 342.

But the question of actual possession is not one of *title*, within the meaning of a statute using that term; and a justice of the peace may therefore determine it. *Ehle v. Quackenboss*, 6 Hill, 537.

possession of the premises at the time when, &c., though the term was then expired.¹ So to an action of trespass the defendant pleaded, that the *locus in quo* belonged to the United States, and that one of the defendants had, long before the commission of the supposed trespasses, and at the time thereof, a "claim title" to said land, and had built a dwelling-house thereon, and was then and there the owner thereof, and, as such, he and the other defendants, as his servants, entered said land as they lawfully might, and removed said dwelling-house, &c. Held, the plea was insufficient, as it did not allege possession in the defendant at the time of the plaintiff's entry.² (a) But, in general, in an action of

¹ *Penton v. Robart*, 2 F. 88.

² *Ross v. Nesbit*, 2 Gilm. 252.

(a) Trespass for an assault. The defendants justified, in defence of the possession of the dwelling-house of one W., and by his command. New assignment, that the trespass was committed out of the dwelling-house, "to wit, in and upon a certain bridge in a certain farm, called 'Bengrove Farm,' and in divers, to wit, two gardens, two fields, and two folds of and in the same farm, and for another and different purpose." Plea to the new assignment, that W. was possessed of the dwelling-house, and also of the yards, fields, and folds which belonged to the dwelling-house, and were adjacent thereto; and that the trespasses newly assigned were committed in defence of the said possession, by removing the plaintiff; and that the defendants "did then take the plaintiff by the nearest and most direct way to a certain public highway near to the said dwelling-house, &c., as they lawfully might for the cause aforesaid." Upon demurrer to the replication, it was objected "that this plea did not justify taking the plaintiff to the highway, as it did not show that it was necessary to do so, or that the highway adjoined the dwelling house, &c. Held, that the plea was good, as it intended to confess trespasses committed on the bridge, yards, fields, and folds, and to justify them as committed in defence of the possession; that with these the removal to the highway had no necessary connection, and might be treated as surplusage. To the above plea the plaintiff replied, stating the seizin of W. in Bengrove Farm, and a demise of it to one J. as tenant from year to year; that J. thereupon became possessed, and, being indebted to one B., by indenture granted to him all the growing and other crops then or thereafter on the farm, as security for the principal and interest, and gave B. a power, (on default in payment,) peaceably to take them into his possession; that

trespass to land, the defendant can justify, on the ground that he entered as *the servant* of one in whom are the title and right of possession.¹ (a) But a plea of *license* will not be sustained by proof of a lease.² So in trespass by the United States, a permit to enter upon the lands, which contained lead ore, may be admitted in evidence to show the nature and object of the entry.³ (b) So possession may

¹ Everett v. Smith, Busb. 303.

³ U. S. v. Geer, 3 McLean, 571.

² Johnson v. Carter, 16 Mass. 443.

default was made; that the fields, &c., were parcel of the farm demised to J.; that at the same time, &c., W. was possessed thereof, and there were growing crops therein, belonging at the time of the execution of the indenture and afterwards to J.; that during the continuance of the term, and while J. was in possession, and before W. became possessed, the plaintiff, as B.'s servant, entered and took possession, and continued in possession of the said growing crops until W. became possessed of the farm, &c., the same being a reasonable time; and that he was removed before the lapse of a reasonable time, and although he produced the indenture, and gave the defendants notice of the purpose for which he remained in possession. Held, that, as the replication stood upon the right of a person, claiming under a tenant from year to year, to remain on the premises, and retain possession of the crops after the landlord had resumed possession, it should have stated how the tenancy came to an end; that there was no presumption as to a determination by the landlord rather than by the tenant; nor, supposing that B. was entitled to the crops after his interest as tenant in the premises had determined, that they were ripe or fit for harvesting, or that they needed any cultivation, for which the plaintiff's continuing in possession was necessary. Hayling v. Oakey, 18 Eng. L. & Eq. 532.

And the general principle was laid down, that a party who insists upon remaining on the land of another against his will, and therefore *prima facie* against right, ought to show all the circumstances which make such possession lawful, and abridge the general rights of property. Ibid.

(a) The owner of a sleigh conveyed it in mortgage to A., and afterwards delivered it in pledge to the plaintiff. The defendant, by authority and direction of A., took possession of the sleigh; and the plaintiff brings an action of trespass against him. Held, such mortgage and authority were admissible, under the general issue, as an answer to the action. Fuller v. Rounceville, 9 Fost. 554.

(b) A final receipt, by an officer of the government authorized to act in

be *by* or *through*, as well as *under*, another trespass *quare clausum*; plea, that the defendant was seized in his demesne as of fee of a messuage, &c., in the parish, and that he and all those whose estate, &c., have a right of way for himself, his and their farmers and tenants, occupiers of the messuage, &c., over the *locus in quo*, to and from the messuage, &c., as appertaining thereto. Replication, that the defendant, &c., have not the said way as appertaining, &c. Held, that the defendant's showing that he was seized in fee of an ancient messuage in the parish, to which a right of way, as pleaded, over the *locus in quo* belonged, was sufficient to support his plea, although the messuage was let to, and in the occupation of a tenant, and the defendant only occupied a newly-built house in the parish at the time of the trespass. Also, that a plea that the defendant was seized in his demesne as of fee, &c., was good, without alleging that the defendant was occupier.¹

13. On the other hand, *the want or absence of possession* may sometimes be set up as a defence; possession being the foundation of the alleged liability upon which the action is founded. Thus the defendant resided with his father upon a farm; of which the defendant had a deed and his father a life lease. Action for damages done to the plaintiff's close by the defendant's cattle. It appeared, that the cows kept upon the farm had trespassed upon the plaintiff's farm, but that the defendant owned but one cow, which was also kept upon the farm. Held, evidence competent for the jury, and from which they might find for the plaintiff.² (a) So in an

¹ Stott v. Stott, 16 E. 343.

² Cram v. Dudley, 8 Fost. 537.

the premises, for rent, is a full discharge, being subsequent to the trespass alleged, although the officer may never have accounted for the money received. United States v. Geer, 3 McL. 571.

(a) It has been held, that, at common law, a party, into whose land agisted cattle escape, and there do damage, may maintain trespass against the general owner of the cattle or against the agister at his election. Sheridan v. Bean, 8 Met. 284.

action for an injury from falling down an unprotected area, the declaration stated, that the defendant was possessed of the premises, and that they were adjoining "a certain common and public street and highway." It appeared, that the defendant had agreed with the owner of the premises, (two carcasses of houses,) to finish one of them, for doing which he was to have the other, and that workmen employed by him were then actually at work upon them; but not that any conveyance had been made to him. The street, which had been forming for six years, and led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved; but the inhabitants had paid the highway and paving rates. Held, this was sufficient evidence to go to a jury, of a possession in the defendant and a dedication of the street to the public.¹ So in an action for nuisance, it is sufficient to state the defendant's possession of the property, by means of which the nuisance is caused.² And for either misfeasance or nonfeasance, as for leaving open a door, or not repairing fences, ways, or water-courses, the action should be, in general, either against the party doing the act, or *the occupier*, not the owner.³ So the occupier of a house is bound to rail or fence in the area; and, if an accident happen, it is no defence, that the premises had been in the same situation for many years before the defendant came in possession.⁴ So the occupant of a house, having a cellar opening upon the highway, is bound, in using it, to take reasonable care that the *flap* be so placed and secured, as not, under ordinary circumstances, to fall in or occasion injury. But, if he have so placed and secured it, and a wrongdoer throw it over, the occupant is not liable.⁵ So the defendant was administrator of one of two mortgagees of real estate, on which was a mill and a reservoir dam. While

¹ *Jarvis v. Dean*, 11 Moore, 354.

² *Stanciliffe v. Hardwick*, 3 Dow. P. C. 766.

³ *Mathews v. West, &c.* 3 Camp. 403; *Cheetham v. Hampson*, 4 T. R.

318; *Rider v. Smith*, 3 Ib. 766; *Sutton v. Clarke*, 6 Taunt. 44.

⁴ *Coupland v. Hardingham*, 3 Camp.

398.

⁵ *Daniels v. Potter*, 4 C. & P. 262.

the premises were in possession of certain persons under license from the other mortgagee, who had subsequently quitclaimed all his interest therein to the defendant, the dam broke away, as the plaintiffs alleged, because of its original insufficiency and subsequent want of repair, and carried away the plaintiff's bridges. Held that, if so, the defendant was not liable for the loss, not being in possession by himself nor by his tenants.¹ So an action on the case for flowing lands will not lie against a former owner of land, who erected a dam and built a mill, by means of which the injury is done, where other persons are in possession, and there is no evidence that they hold as his tenants. The action must be against the persons in possession.² But a mortgagee of a mill-dam, &c., who has taken possession for breach of condition, is liable for the unpaid annual damages for flowing land, awarded against the mortgagor.³ So the occupant, not the owner, of land, is bound to repair drains and sewers. Hence, in a suit by an adjoining owner for non-repair thereof, the declaration must allege occupation.⁴ And although the owner of property may, under some circumstances, as occupier, be responsible for injuries, arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants; in general, such liability does not attach to him, as owner, even for the use of a thing which he himself erected. Therefore, an action does not lie against the owner of premises, for a nuisance arising from smoke out of a chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage; on the ground that, having erected the chimney, and let the premises with the chimney so erected, he had impliedly authorized the lighting of a fire therein. And, the premises having been in the occupation of a tenant, at the time the fires were lighted, the defendant is entitled to a verdict on a plea of "not possessed;" which refers to the

¹ 11 Cush. 299.

² *Blunt v. Aikin*, 15 Wend. 522.

³ *Faller v. French*, 10 Met. 359.

⁴ *Russell v. Shenton*, 3 Ad. & Ell. N. S. 449. See *Bell v. Twentyman*, 1 Ib. 766.

time when the nuisance was committed, and not when the chimney was erected.¹ And, even if title or ownership alone in the defendant would furnish a ground of action; yet possession, if alleged, must be proved. Thus in an action of trespass, upon a statute, which provides, that every owner or keeper of any dog shall forfeit to any person injured by such dog double the amount of damages sustained by him; if the declaration allege that the defendants were the owners and keepers of the dog, the plaintiff must prove that they were both.²

14. Upon the same principle is founded the well-established rule, that, if the defendant in an action of trover, has no possession, actual or constructive, at the time of demand and refusal, and there has previously been no tortious taking or withholding; he is not liable, though he may have forcibly interposed obstacles to the owner's obtaining possession.³ (a) So, where a person, lawfully coming into possession of the property of another, has parted with it previous to a demand; the remedy is not trover, but case or assumption.⁴ So trover cannot be maintained against one who has never had possession of the property, and has had nothing to do with it, except that he has taken a mortgage on it to secure a debt, from a person claiming to be the owner.⁵ (b)

¹ Rich v. Basterfield, 4 Com. B. 783. See Zachery v. Race, 4 Eng. 212;

² Buddington v. Shearer, 20 Pick. Brockway v. Burnap, 16 Barb. 309.

477.

⁴ Kelsey v. Griswold, 6 Barb. 436.

³ Boobier v. Boobier, 39 Maine, ⁵ The Matteawan, &c. v. Bentley, 13 406; Kelsey v. Griswold, 6 Barb. 436. Barb. 641.

(a) See *Trover, Conversion*.

(b) Upon the same principle, the owner of goods stolen, prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. For, in order to maintain trover, the plaintiff must prove that the goods were his property, and that while they were so they came into the defendant's possession, who converted them to his use. But he has a right to restitution of the goods in specie. Horwood v. Smith, 2 T. R. 750, 755.

And, if *actual possession* be not in all cases necessary, still there can be no conversion, without either such possession, or the exercise of such a claim of right or dominion as assumes that the party is entitled to possession, and to deprive the opposite party of it. Thus, where an officer counted certain logs, frozen in the ice, declared them to be attached, took a receipt for them, and made a return upon his writ to that effect, of which he lodged a copy with the town clerk, and, in ten days, the action was settled and the attachment dissolved; held, not a conversion.¹

15. It has been held, that an action cannot be maintained on the ground of possession of a chattel or of real estate, where the legal title is in another, and the plaintiff has only *a trust*.² Thus, where a slave is conveyed in trust for the use of a married woman, who is entitled to possession; an action for conversion must be brought by the trustee.³ And, on the other hand, a trustee, though having a mere naked trust, may bring trover for trust property.⁴ So, where a slave was given to A. in trust for B., a married woman; who, by the terms of the trust, had possession of the slave; held, the right of action for an injury to the slave, which caused his death, was in the trustee.⁵ So a secret resulting trust, arising from the fact that property was paid for with the defendant's money, the possession never being surrendered to him, is no defence to an action of trover, brought by the party having the legal title.⁶ But in trover by a guardian, if the declaration allege that the property claimed, being in the possession of his ward, was lost, &c., it is bad on demurrer, in not showing that the guardian was entitled to the possession.⁷ (a) But, on the other hand, where a

¹ Fernald v. Chase, 37 Maine, 289.

Thompson v. Ford, 7 Ired. 418; Bur-

² Lespeyne v. M'Farland, 2 Tayl. 187; nett v. Roberts, 4 Dev. 81.

Jones v. Taylor, 1 Dev. 435.

³ McRaeny v. Johnson, 2 Florida,

⁴ Richardson v. Means, 22 Mis. 520.

495.

⁵ Guphill v. Isbell, 8 Rich. 463.

⁶ Coleson v. Blanton, 3 Hayw. 152;

⁷ Dearman v. Dearman, 5 Ala. 202.

(a) The plaintiff, residing abroad, shipped sugars under a bill of lading,

vendee of land goes into possession, the legal title remaining in the vendor, the vendor cannot maintain an action on the

addressed to A. in London, directing him to sell the sugars on the plaintiff's account, and place the net proceeds to the credit of B., to whom the plaintiff was indebted for advances made previously to the shipment. The invoice stated the plaintiff to be the shipper. A., on the arrival of the sugars, pledged them to the defendants for advance made by them to him; and, having become bankrupt, the plaintiff authorized an agent to demand the sugars of the defendants; but they sold them, and the proceeds were demanded after the sale by the agent, with the authority of the plaintiff. Held, that the latter had a sufficient title in the sugars to sue the defendants in trover, as the right of possession was in him, and B. had only an equitable interest; and that the defendants, by selling the sugars after the demand by the plaintiff's agent, were guilty of a conversion. *Sellick v. Smith*, 11 Moore, 469.

Deed of land, naming no grantee, one third thereof "for the use of a school-house thereon, if the neighboring inhabitants see cause to build a school-house thereon." A school-house was built thereon by a school district, and afterwards the defendant, as agent of a school district *de facto*, acting as successor of the former district, leased a part of the tract to the plaintiff for ten years. The plaintiff held over after the expiration of the ten years; and a school district, which had been duly constituted after the lease was made, authorized the defendant to enter on the tract and take possession thereof for the district. He entered accordingly, and the plaintiff brought an action of trespass against him. Held, that, though no legal estate passed by the deed, yet a trust was thereby created, which the Court would be authorized and bound as a Court of Equity to protect, and would appoint a trustee to take the legal estate from the grantor's heirs, who would be bound to convey it to him; that the lease was admissible in evidence against the plaintiff; and that he was estopped to deny that A. was duly appointed agent of the school district *de facto*, or that the district had a good title to the tract. *Bailey v. Kilburn*, 10 Met. 176.

In 1785, W. conveyed to A., B. and C. a tract of land formerly belonging to the town of S., bounded westerly on Connecticut River, "in trust for the use of the inhabitants of the first parish in S. for a burying-ground forever," with words of inheritance in the *habendum* clause, and with a covenant of warranty. Long before this conveyance, a part of the tract had been set apart and appropriated by the town as a burying-ground; and had been used as such, while the town and parish were identical, and after the separate organization of the parish. About the time of the conveyance, the parish made provision for fencing the burying-ground, and erected, about

case against a wrongdoer, for an injury to the inheritance during such possession, although it does not appear that the vendee has entitled himself to a conveyance; nor can he recover damages arising out of the rescission of the sale by reason of such injury.¹

16. The question of possession sometimes arises, in reference to an authority conferred upon *public officers* relating to the property which is alleged to have been injured. Thus the commissioners of sewers cannot maintain trespass against the commissioners of a harbor, for breaking down a wall or dam, erected by the former, as such commissioners, across a navigable river; the authority, to be exercised by them on behalf of the public, not vesting in them a sufficient property or possessory interest.² So upon the ground, that, in order to bring trespass, a party must, at the time of the trespass, either have actual possession, or else a constructive possession, in respect of the right being actually vested in him; trespass will not lie, by the assignees of a bankrupt against a sheriff, for taking the goods of the bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission; notwithstanding he sells them after the issuing of the commission, and after a provisional assignment and

¹ *Ives v. Cress*, 5 Barr, 118. See *Rood v. The New York*, &c. 18 Barb. 80.

² *Duke of Newcastle v. Clark*, 2 Moore, 666.

the year 1800, a fence on the top of the bank of the river. That part of the tract which constituted the shore and bank of the river was unsuitable for a burial-place, and was never used as such; and in 1842 the parish conveyed it to the plaintiff, who brought an action of trespass against the defendant, who defended under a license from the town. Held, the deed conveyed a fee simple estate; that, if the parish had not the legal estate, but only the equitable estate (which was not decided) yet, as they were in possession, they could hold against all persons not claiming under the original grantees; and, as they entered and claimed title under the deed, they acquired a seizin of all the land therein described; and the plaintiff, their grantee, could well maintain his action. *Stearns v. Palmer*, 10 Met. 32.

notice from the provisional assignee not to sell. But the assignees may bring trover.¹ (a)

17. As has been already intimated, possession is good ground of action against a party having himself no title, although a third person may have a better title than the plaintiff. Thus, in trespass or trover for seizing goods in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person, to defeat the action;² at least without specially pleading, that the possession of the plaintiff was fraudulent;³ or proof of some title or interest derived from such third person.⁴ So, in an action of trespass *quare clausum*, the defendant cannot avail himself of the title of a third person, without showing both the title and the command or permission of that person.⁵ Thus a plea of freehold in a third party is bad.⁶ So A., who owned a slave, died intestate, and no administration was ever granted on his estate; but his next of kin took possession of the slave and kept him for seven years. They then sold him to B., who kept him for ten years, and then died, when his executor sold him to C., who had possession of him for four years. The slave then ran away, was caught and imprisoned, and taken out of jail by D., who, upon demand, refused to deliver him to C. Held, that C.'s possession was good as against every one but the adminis-

¹ Smith v. Milles, 1 T. R. 475.

² Nelson v. Cherrill, 1 Moo. & S. 452; Fiske v. Small, 25 Maine, 453.

³ Huddleston v. Spear, 3 Eng. 406.

⁴ Harker v. Dement, 9 Gill, 7.

⁵ Merrill v. Burbank, 10 Shep. 538.

⁶ Richardson v. Merrill, 7 Mis. 333.

(a) It has been held, in Maine, that the minister of a parish, settled for life or for years, being seized of the freehold in the ministerial land, upon condition, and answerable for waste, may maintain trespass against a stranger for an injury done to the freehold, and that the suit is not abated by the termination of the estate pending the suit. *Cargill v. Sewall*, 1 App. 288.

But it has been since decided, that the minister of a religious society cannot, as such, maintain trespass *quare clausum* for the use of the society. *Cox v. Walker*, 26 Maine, 504.

trator of A., should any exist, and that he was entitled to an action of trover against D., who was a mere wrongdoer, and set up no title in himself.¹ So in trover, and a plea of *not guilty*, and *not the plaintiff's property*, it appeared that the plaintiff was in possession of goods which he claimed as his own property, under an assignment to him from O. The defendants seized the goods in the plaintiff's possession, claiming them under an assignment from O. to them, made whilst O. was in apparent ownership of the goods, but of a later date than the assignment to the plaintiff. This was the conversion. The defence was, that the assignment by O. to the plaintiff was fraudulent as against the defendants. This was left to the jury, who found for the plaintiff. The defendants also offered as a defence to prove, that O. had become bankrupt before the plaintiff took possession, and that the goods were in his order and disposition, and therefore vested in the assignees before the conversion. Held, this defence was not admissible, but, the plaintiff being in possession, and the defendants being wrongdoers, not claiming in any way under the assignees, the defendants could not set up the *jus tertii* as a defence in trover.² So in trespass, for taking goods in possession of the plaintiff, where both parties claim under the same person, neither can deny the title of such person, or set up an outstanding paramount title in a stranger, unless he can connect himself with the true owner.³ And it is no defence, that the plaintiff had given a mortgage of the property, which had become forfeited, without showing a connection between the defendant and the mortgagee.⁴ So, where a horse, belonging to the United States, was taken by the enemy, and shortly after retaken by the plaintiff, who continued in the possession, until it was taken from him by the defendant, an officer in the army of the United States, acting under the orders of a superior offi-

¹ Craig v. Miller, 12 Ired. 375.

² Jeffries v. Great Western, &c. 5 Ell. & Black. 802; 34 Eng. L. & Eq. 122.

³ Barwick v. Wood, 3 Jones, Law

306. See King v. Orser, 4 Duer, 431; Whitney v. Brunette, 3 Wis. 621.

⁴ Hanmer v. Wilsey, 17 Wend. 91.

cer, but not the authority of the United States; it was held that the plaintiff could maintain trespass, the law presuming until the contrary be proved, that the United States never intended to interpose any claim to the property.¹ And, in trespass against an officer, for taking goods from the plaintiff's possession, on execution against a third person; it is even held that an authority to do so from the owner of the goods does not constitute a justification to the officer; but the plaintiff is entitled to nominal damage for the injury to his possession. And the measure of damages is the actual value of the goods, and any further reasonable sum, for injury and vexation by delay caused by the act of the defendant.² So, where the defendant in an action of trespass offered to prove the right of property in a third person, but was not permitted to, and the bill of exceptions did not set out the evidence, or a possessory right in the plaintiff; it was held that the evidence offered was irrelevant, and that a new trial would not be granted.³ And, as has been already suggested, the same rule prevails, even where the plaintiff came wrongfully into possession of the property. Thus a party having a legal title to, and having had possession of a slave, though acquired fraudulently, may maintain an action against any third person who aids the slave to escape.⁴ So, where A. caught up a mare and colt, which were straying, and kept them for a year and more, and worked the mare, and the mare was shot dead by the defendant; it was held that A.'s possession was sufficient to maintain trespass.⁵ So a reversioner, who has by wrong regained possession of land which was under a lease, may maintain trespass against a mere stranger who has invaded his possession.⁶ So where the owner of goods assigns and delivers them to another person, as security for a debt, and the assignee assigns and delivers them to the plaintiff, by an instrument void as against the provisions of a statute, with the assent of the original

¹ *Cook v. Howard*, 13 Johns. 276.

² *Rogers v. Fales*, 5 Barr, 154.

³ *Crawford v. Bynum*, 7 Yerg. 381.

⁴ *Law v. Law*, 2 Gratt. 366.

⁵ *Boston v. Neat*, 12 Mis. 125.

⁶ *Rollins v. Clay*, 33 Maine, 132.

owner; an action of trespass can be maintained therefor, against one who takes them without right and as a mere wrongdoer.¹ So a plaintiff in trespass, having the sole and exclusive possession, may recover against a wrongdoer the whole damage done by the defendant, though the conveyance from some of those under whom he claimed title was defective.²

18. But, as has been already suggested, possession furnishes only *presumptive* evidence of title. Thus it is held, that, in trover for a note, possession of the note by the plaintiff is *prima facie* evidence of ownership, *against one who shows no title to it*.³ So, in replevin for certain hogs taken by the defendant, as deputy sheriff, on an execution against A., the Court charged the jury, that, if A. was found in the possession of the hogs, he would be presumed to be the owner; but that this presumption would yield to proof, and that any proof would be sufficient, if it produced belief in the minds of the jury that the title was in another. Held, this charge was correct.⁴ And hence, *a title in the defendant himself*, or one under whom he claims or with whom he is in privity, is a good defence to an action founded on possession.⁵ (a) Thus, where the defendant in trespass has proved title to the goods, the plaintiff cannot recover upon his possession without proof of a better title.⁶ So where a tene-ment is in the possession of a wrongdoer, the person entitled to possession may enter peaceably, in the absence of the wrongdoer, and retain the possession.⁷ And a person cannot be made liable in trespass, for entering upon his own land in the wrongful possession of another, and exert-

¹ *Barker v. Chase*, 11 Shep. 230.

² *Curtis v. Hoyt*, 19 Conn. 154.

³ *Donnell v. Thompson*, 13 Ala. 440.

⁴ *Park v. Harrison*, 8 Humph. 412.

⁵ *Hutchinson v. Lord*, 1 Miss. 286;

Jones v. Water-lot Co. 18 Geo. 539.

⁶ *Champion v. Smith*, 1 Brev. 243.

⁷ *Culver v. Smart*, 1 Smith, 50.

(a) Proved, in case of real property, either by deed or other documentary evidence, or by an actual adverse and exclusive possession for twenty years. *Brest v. Lever*, 7 M. & W. 593.

ing a right of ownership; nor can any unlawful acts committed in the execution of this right, be so connected with it, as to make him liable in damages as a trespasser *ab initio*.¹ (a) Thus the person entitled to possession of a house may enter peaceably, in the absence of a wrongdoer in possession, and lock the doors thereof.² So a disseizee, having a right of entry, and entering peaceably on land, no one being thereon, and taking possession under his title, thereby acquires the right to maintain an action of trespass against the disseizor and others for a subsequent breach and entry.³ So, in trespass *quare clausum fregit*, the defendant may show, in mitigation of damages, that the plaintiff was in possession of the premises at the time of the alleged trespass, by disseizin of, and trespass on, the defendant.⁴ But, where a defendant in trespass wishes to defend as having the right of possession, he may plead the general issue; he is not bound even if permitted, to plead such right specially.⁵ And a right to the possession of real estate will not justify an assault and battery to obtain possession; though possession in fact justifies the use of violence, if necessary to defend it.⁶ So, in order to maintain this defence, the defendant must have not only title, but the right of possession. Thus where, in trespass, the defendant pleads title, and the plaintiff replies facts, which show that he was in possession at the time, and that the right of possession was out of the defendant, or those under whom he entered, though the title set up is not legally vested in the plaintiff; the replication is good.⁷ And

¹ Johnson v. Hannahan, 1 Strobb. 313; Inskeep v. Shields, 4 Harring. 345.

² Culver v. Smart, 1 Cart. 65.

³ Tyler v. Smith, 8 Met. 599.

⁴ McDonald v. Lightfoot, 1 Morris, 450.

⁵ Sage v. Keesecker, 1 Morris, 338.

⁶ Parsons v. Brown, 15 Barb. 590.

⁷ Phillips v. Kent, 3 Zab. 155.

(a) In Ohio, where the owner of a stray raft (within thirty days after it was taken up,) regained possession thereof by force, without offering to prove his right or pay reasonable charges, it was held that the taker had no right under the statute to replevy it. Coverlee v. Warner, 19 Ohio, 29.

replication of possession in virtue of a parol purchase is good to the plea of *liberum tenementum*.¹ And mere ownership of the soil is not in all cases a justification of an alleged trespass committed thereupon. (a) Thus a grant, to one and his heirs and assigns forever, of all the trees and timber standing and growing in a close, with free liberty to cut and carry them away at pleasure, conveys an estate of inheritance in the trees and timber; and the grantee may maintain trespass *quare clausum* against the owner of the soil for cutting down the trees.²

19. The general doctrine, of the sufficiency and necessity of possession, as the foundation of a legal claim or defence, is further illustrated by the well-established principle, that possession may be *constructive*, as well as actual. (b) The rule is well settled, that the general owner of property holds constructive possession, and may maintain trespass, though the actual possession (without claim of title) be in another.³ Thus, to maintain trespass *quare clausum*, the plaintiff must have *actual or constructive possession*. Where no one has the actual possession, the person having title has the constructive possession. But he cannot bring trespass

¹ Hope v. Casom, 3 B. Monr. 544.

² Clap v. Draper, 4 Mass. 266.

³ Cary v. Hotelling, 1 Hill, 312; Crenshaw v. Moore, 10 Geo. 384.

(a) In trespass *quare clausum*, where neither party had actual possession, it is erroneous to instruct the jury, that the defendant would not be liable for the act, if he did it "in the *bonâ fide* assertion of a claim of title, which he thought to be good." Shipman v. Baxter, 21 Ala. 456.

(b) Possession once proved is presumed to continue. Thus, in trespass to try titles, an allegation that the plaintiff was in possession on the 1st of January, and that the defendant entered with force and arms on the 2d, was held to be a sufficient possession at the time of ouster. Parker v. Haggerty, 1 Ala. 632.

So, when the defendant in trover fails to give any account of the manner in which he acquired possession, he will be presumed to hold from or under the person, who is shown to have had the possession for several years next before the defendant acquired it. Barnes v. Mobley, 21 Ala. 232.

against one having actual possession.¹ But *actual* possession is sometimes held to consist in mere constructive acts of ownership. Thus the *actual* possession of crown land, under a parol license from the crown, is held to entitle a party to maintain trespass against a wrongdoer. And payment of a nominal rent to the crown, the occasional occupation of the land by sporting over it, and taking the grass by a servant, constitute sufficient evidence of such actual possession.² So the plaintiff's possession by enclosures need not be proved, in an action of trespass against one neither proving nor claiming title to the land; if the land has been used by the plaintiff, it is sufficient.³ It is said, "Every man's land is in the eye of the law enclosed and set apart from his neighbor's, and that, either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary existing only in the contemplation of law, as when one man's land adjoins to another's in the same field."⁴ So cutting wood upon a wood-lot, up to a well known and determinate line, although there is no fence upon the line, during a period of thirteen years, constitutes such actual possession, as will support trespass against any who do not show better title in themselves.⁵ More especially an entry upon land under a deed, claiming title; cutting and selling timber from time to time; and exercising general acts of ownership; are sufficient to maintain an action of trespass against a stranger.⁶ So a deep navigable watercourse, surrounding a party's land, is a sufficient enclosure, to render an entrance thereon by other persons, for purposes of hunting, a breach of his close, and to entitle him to damages, as for a trespass.⁷ And one who shows title in himself may main-

¹ Vance v. Beatty, 4 Rich. 104; Stean v. Anderson, 4 Harring. 209; Dobbs v. Gallidge, 4 Dev. & Bat. 68; Cohoon v. Simmons, 7 Ired. 189. See Webb v. Sturtevant, 1 Scam. 181; Graham v. Houston, 4 Dev. 232.
² Harper v. Charlesworth, 6 Dowl. & Ry. 572; 4 B. & C. 574; 14 Pick. 297, acc.

³ Tyson v. Shurry, 5 Md. 540.
⁴ 3 Bl. Comm. 209. See Gleason v. Edmands, 2 Scam. 448.

⁵ Chandler v. Walker, 1 Fost. 282; Machin v. Gerner, 14 Wend. 239.

⁶ Sawyer v. Newland, 3 Verm. 383.

⁷ Fripp v. Hasell, 1 Strobb. 173.

tain trespass *quare clausum*, for a trespass upon vacant and wild lands, although he has never had actual possession, either by formal entry or occasional occupancy.¹ Thus a purchaser of lands from the United States may maintain trespass for an injury to the freehold, after the purchase, by a person entering and keeping possession, without claim or title, even before the purchase.² (a) And where the plaintiff claims title by adverse possession, and shows acts of dominion over the *locus in quo*, which was part of a highway, and especially cutting wood thereon for his fires; the defendant cannot prove, for the purpose of showing that these acts did not constitute adverse possession, that, when the plaintiff so cut wood, it was, and long had been, customary for any person who chose, although not owning the fee of the highway or of the adjacent land, to cut wood for his fires from such highway; without proving or claiming that any such acts were done in the *locus in quo*.³ So, by a vote of the proprietors of a township, a lot of land was appropriated for a meeting-house. In 1727, after the erection of the meeting-house, the town was incorporated, and assumed the charge of its parochial affairs. The land around the meeting-house was called "the common" or the "meeting-house land," was always open, and was intersected by several highways and other ways. It was also used as a site for horse-sheds, and for all the ordinary purposes incident to a place of worship, and as a training field. The town meetings had been held at the meeting-house. In 1754 and 1763, the proprietors voted to sell por-

¹ McGraw v. Bookman, 3 Hill, S. C. 265.

² Gale v. Davis, 7 Mis. 544; Blevins v. Cole, 1 Ala. 210.

³ Evans v. Bidwell, 20 Conn. 209.

(a) But the actual occupancy of one half quarter section of land does not draw after it the possession of an adjoining unoccupied quarter section, upon which the occupant had exercised acts of ownership by cutting logs for his saw-mill, so that he can maintain trespass *quare clausum* against one who had also cut logs thereon, and was in the actual occupation of adjoining land. Blackburn v. Baker, 7 Port. 284.

tions of the "meeting-house land," and they had also at different times exercised other acts of ownership over portions of this land. It was held, that the first parish, which was the successor of the town in its parochial capacity, might maintain trespass against a stranger, who had ploughed up a portion of the land, which was used for purposes incidental to a place of worship.¹ (a) But it has been held, that making

¹ First Parish in Shrewsbury v. Smith, 14 Pick. 297.

(a) Constructive possession may be set up for a defence, as well as a ground of action; and this both *positively* for the defendant and *negatively* against the plaintiff. Thus, while the possession of part of a tract of land, by the owner of the whole, is the possession of the whole; it is otherwise with a trespasser, whose possession extends only to actual occupancy. Kincaid v. Logue, 7 Mis. 167; Sloane v. Moore, Ibid. 170.

Thus a purchaser of land, adjoining that of which he is in actual possession, is constructively in possession to the extent of the boundary of both tracts; and one who enters on that possession, and builds a cabin and locks it up, is not in possession beyond the actual close, and cannot maintain trespass against the former for cutting timber on the land. Fish v. Branamon, 2 B. Mon. 379.

Upon the same principle, if the party having the legal title to land enter thereon (as by going thereon, and beginning to plough, &c) with intent to take possession, although he does not declare such intent; he may maintain trespass against one wrongfully in possession at the time of entry, and who, without quitting possession, desires the owner to go away, and in fact continues his wrongful possession afterwards. Butcher v. Butcher, 7 B. & C. 399.

The effect of constructive possession will be limited by the purpose of the parties in the act which constitutes it. Thus where A. delivered to B. the key of his house, for the purpose of putting B. in the possession of goods therein, but not of the house itself; held, B. had not such a possession of the house, as would support trespass for breaking and entering it. Davis v. Wood, 7 Mis. 162.

Possession being available as *evidence of title*, an instruction to the jury, in an action of trespass for taking and carrying away goods, that, in order to entitle the plaintiff to a verdict, he must show a *title* to the property, or to some part of it, at the time of the alleged trespass, is not erroneous. Roberts v. Wentworth, 5 Cush. 192.

It is to be observed, that there is a distinction between constructive possession and a mere *right of entry*; which, in case of real property, is not sufficient to maintain trespass. Hollis v. Coldfinch, 1 B. & C. 205.

pole bridges, over a ditch on the side of a public road, for driving cattle into a tract of swamp land, and the ranging of cattle on the same, and occasionally cutting a few timber trees, is not such a possession, as will maintain the action of trespass.¹ So it has been held, that where a person owns two tracts of land by different titles, but adjoining each other, the possession of one is not the possession of the other.²

20. A deed, conveying the land to the plaintiff in fee, without entry, is *prima facie* sufficient evidence of ownership, as against a person making no claim either to the title or to the right of possession.³ And a party having such deed is presumed to enter under it.⁴ (a) But an unrecorded deed of

¹ *Morris v. Hayes*, 2 Jones, Law, 93.

² *Ibid.*

³ *Warner v. Cochran*, 10 Fost. 379; *Gardner v. Heartt*, 2 Barb. 165.

⁴ *M'Grady v. Miller*, 14 Verm. 128.

said (3 Steph. N. P. 2632) (although, as appears in the text, the remark is of very limited application,) "a distinction exists between personal and real property respecting the rights of the owner. In the first case the general property draws to it a sufficient possession to enable the owner to support trespass, though he has never been in possession; but in the case of land and other real property, there is no such constructive possession; and unless the plaintiff had the actual possession by himself or his servant at the time when the injury was committed, he cannot maintain this action."

The following may be mentioned as examples of this rule: Before entry and actual possession, a *parson* cannot maintain trespass, though he may have the freehold in law. (9 Vin. Abr. *Entry*, 449 C.) Or an heir. (*Browning v. Beston*, Plow. 142.) Or a devisee, against an abator. (2 Mod. 7.) Or a lessee for years. (4 Bac. Abr. *Leases*, M.)

(a) The burden of proof is held to be upon the party claiming under a deed, which is referred to and excepted in the plaintiff's grant, to prove its application to the land entered upon by the plaintiff. Thus, in an action of trespass, the plaintiff declared on a grant from the State of land described by metes and bounds, with the exception of 250 acres previously granted. Held, that it was incumbent on the defendant to show, that the trespass was committed on the part previously granted. *McCormick v. Munroe*, 1 Jones, Law, 13.

In an action of trespass brought by an owner of land against a railroad corporation, for entering upon his land and there constructing their road;

wild land is not of itself sufficient evidence of possession by the grantee, to entitle him to maintain trespass.¹ Nor, it is held, a deed, more especially of mere release and quitclaim, without proof of actual possession by the grantor, or of any entry by the grantee.² (a)

¹ *Estes v. Cook*, 22 Pick. 295.

² *Marr v. Boothby*, 1 App. 150;
Gardner v. Heart, 1 Comst. 528.

the burden of proving that the land is covered by the authorized location of their road is upon the defendants. *Hazen v. Boston, &c.* 2 Gray, 574.

A deed described the land as *lot No. 6*, the extent of which lot was doubtful, but the plaintiff, claiming under such deed, showed an entry upon what he claimed by definite boundaries, as part of that lot. Held, an action of trespass was maintainable against one without title, who interfered with the plaintiff's possession, whether the land were actually part of this lot or not. *Poor v. Gibson*, 32 N. H. 415.

In trover, for personal property conveyed by a deed which was not properly registered, proof of the delivery of the property is competent, independently of any question about the admissibility of the deed. *Grady v. Barron*, 6 Yerg. 320.

(a) Though an instrument not under seal cannot convey the legal title to land, yet, in an action of trespass, it may be competent evidence to show a license or authority from the owner of the land to the defendant to enter thereon. *Floyd v. Ricks*, 14 Ark. 286.

But a promise under seal, to make a title in fee-simple at some future time to land, provided the passage of an act of Congress can be obtained to authorize such conveyance, is not evidence to show title in the defendant in trespass. *James v. Tait*, 8 Port. 476.

Where the defendant went into possession of land under a parol contract of purchase, and, not having paid the purchase-money according to the contract, the owner of the land sold and deeded it to the plaintiff; it was held, that this did not constitute the defendant a tenant to the plaintiff, nor give the plaintiff any possession of the land, so as to enable him to maintain trespass against the defendant for an injury done to the plaintiff. *Ripley v. Yale*, 16 Verm. 257.

Where a father conveyed slaves to his son by deed; in trover by the father against the son, it was held competent to prove a parol agreement, made at the time of the conveyance, that the father should retain possession of the slaves during his life. *Strong v. Strong*, 6 Ala. 345.

One who has made and left shingles on vacant land may maintain trespass against one who carries them away, though under a license from a party

21. Where a man enters into possession of land, it is presumed that he enters in his own right; and, if he enters under a deed, his acts are taken to be the acts of an owner, and not of a trespasser.¹ But where the plaintiff, who was in possession of premises sold under execution to the defendant, brought an action of trespass against the defendant, for an entry before he had received a deed from the sheriff; held, while the sheriff's deed related back to the sale *as to the title*, it did not relate back so as to justify a breach of the plain-

¹ M'Grady v. Miller, 14 Verm. 128.

receiving a grant of the land after the making and before the removal of the shingles. *Reader v. Moody*, 3 Jones, Law, 372.

In an action of trespass *quare clausum*, a party has a right to show such evidence of title as he possesses, in order to obtain a decision upon the proper construction of a deed, under which he claims a right by license from the grantees to enter upon the lands and do the acts complained of. *Lonk v. Woods*, 15 Ill. 256.

In an action of trespass to try title, it is held that extrinsic evidence is not admissible to invalidate a grant, by showing that it has been obtained by fraud or mistake, or that an undue priority has been given to it. *Mounce v. Ingram*, 1 Brev. 55.

But the contrary and better doctrine is laid down, that the defendant may impeach a conveyance under which the plaintiff claims, by showing that it was obtained by duress or fraud, or that the consideration of it was the compounding a felony; and, if there be evidence to support either of these objections, the jury are to judge of the sufficiency of the evidence. *Price v. M'Gee*, 1 Brev. 373.

The lands of A. and B. being separated by a crooked fence, A. showed to B. the two extreme points of a division line, and declared that the boundary line between them was straight, and consented to its being so run. B. caused a straight line to be run between the two points, and erected another fence thereon, which included some land which had been in the possession of A. and his ancestors for more than twenty-five years. While the surveyor was running the straight line, A. made no objection to it; but, before the fence was erected, he gave notice to B. to desist, and forbade the erection of it, and, after it was put up, caused it to be pulled down; on which B. brought an action of trespass against him. Held, the parol declarations or admissions of A. were not sufficient to change the possession, and that B. could not therefore maintain trespass. *Dunham v. Stuyvesant*, 11 Johns. 569.

tiff's possession, and the defendant was therefore liable for the trespass.¹ (a)

22. In this connection, it becomes necessary to speak of the common transaction of a *sale of personal property*, as affecting the legal and constructive possession of the thing sold, in the absence of any actual change of possession. In the Law of Sales, this is a fruitful and important topic, but the plan of the present work does not require or permit us to do more than state the general principles pertaining to it, with the citation of a few illustrative leading cases. It will be seen that some of these cases arise between the parties to the sale, and not between one of them and a third person.

23. Sale of a chattel, without actual delivery, gives the vendee a constructive possession, sufficient to maintain trespass, against one who takes the chattel without right.² (b) It is said, "If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or shipmaster, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this is effected; nor is it material, whether the person who is to have the property be a factor or not."³ And even such constructive delivery is not in all cases requisite. Thus, where the owner of a chattel sold it to the plaintiff on Saturday night, and the plaintiff used

¹ Presnell v. Ramsour, 8 Ired. 505.

³ Per Parke, B., Bryans v. Nix, 4 M.

² Parsons v. Dickinson, 11 Pick. 352. & W. 775.

(a) A person claiming land as a preëmptor cannot maintain replevin for timber cut thereon before his right has been proved. Bower v. Higbee, 9 Mia. 259.

(b) The same principle has been applied to a *gift*. If goods given at one place are, at the time of the gift, in another place, and afterwards converted by a stranger before the donee can take possession of them, an action by the donee will lie for the conversion. Collis v. Bowen, 8 Blackf. 262.

due diligence to obtain possession of it on Sunday, but a creditor of such owner took it on that day and secreted it, and caused it to be attached on Monday on a writ against the owner; it was held that the plaintiff might maintain trespass against the creditor and the attaching officer.¹ So, in trespass, three defendants, who were execution creditors, pleaded, first, not guilty, and, secondly, not possessed; and the other defendants, who were bailiffs of the County Court, pleaded, first, not guilty; secondly, not possessed; thirdly, no notice of action; fourthly, that the action was not commenced within three calendar months. It appeared that R. had made a deed of assignment to the plaintiff of the goods in a certain house, to hold upon trust, to permit and suffer R. to hold the goods and premises, until demand of payment of money which should become due, and with further trusts to sell if the money should not be paid. The execution creditors obtained judgment against R. in the County Court, execution issued, and the goods mentioned in the assignment were seized. The plaintiff proved the seizure and sale, by the production of the writ, with the levy indorsed by the bailiff. The jury found that the assignment was not *bonâ fide*, that the bailiffs had been indemnified by the other defendants, and that the bailiffs acted *bonâ fide*, believing that they were acting under the authority of the County Courts Act. A verdict was entered for the plaintiff on the first issue, for all the defendants on the second, and for the defendants who were bailiffs on the third and fourth issues. Held, that a right to the present possession of the goods passed under the assignment, sufficient to entitle the plaintiff to maintain trespass.² So the purchaser of a chattel at a sale by auction may, upon offering to comply with the terms of the sale, and a refusal by the vendor to make delivery, maintain trover therefor.³

24. More especially, as has been suggested, where a sale is

¹ *Parsons v. Dickinson*, 11 Pick. 352.

³ *Simmons v. Anderson*, 7 Rich. 67.

² *White v. Morris*, 11 Eng. L. & Eq.
515.

accompanied or followed by a *constructive delivery*, the buyer acquires a possession sufficient to maintain an action against one who takes or withholds the property. Such delivery generally consists in the delivery to the purchaser of some written voucher or evidence of title, which by the agreement of parties or the usage of trade denotes a complete and executed transfer of the property. Thus a party, to whom the property is to be delivered by the terms of a bill of lading, has the legal title, and may maintain *replevin*.¹ So where goods are shipped to a person, for the special purpose of placing funds in his hands to meet a bill drawn by the shipper upon him; he may maintain *trover*, although no bill of lading is executed, but merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods, to be delivered to the plaintiff. Thus a manufacturer at Newcastle consigned goods to the plaintiffs, his factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt, signed by the mate of the vessel, acknowledging the goods to have been received on board, to be delivered to the plaintiffs. Held, that the plaintiffs had a sufficient property in the goods, and right to the possession, to entitle them to maintain *trover* against a wrongdoer, the consignor not having repudiated the contract upon which they were sent.² So *W.*, possessed of a Stockton wharfinger's receipt for goods about to be shipped to London, assigned the receipt to the plaintiff, together with an order to the defendant, a London wharfinger, to deliver the goods to the plaintiff. The defendant, on sight of the order, before the goods arrived, promised to deliver them to the plaintiff on their arrival. Held, that the plaintiff might maintain *trover* against him, on his refusal to deliver after arrival.³ So, a vendor having ascertained, whilst the goods were in the hands of a wharfinger, that the purchaser to whom they had been originally consigned had

¹ *Powell v. Bradlee*, 9 Gill & Johns. 220.

² *Evans v. Nichol*, 3 Man. & G. 614;

⁴ *Scott*, N. R. 43.

³ *Holl v. Griffin*, 10 Bing. 246.

stopped payment, indorsed the bill of lading to the plaintiff, and directed him to take possession of the goods, and he accordingly demanded them of the wharfinger. Held, the plaintiff had a sufficient special property in the goods to enable him to maintain trover, on the ground, that the right of stoppage *in transitu* by the vendor was not at an end when the plaintiff made the demand.¹

25. But, in case of sale, although a *right of property* may be acquired by the contract itself and other accompanying acts; it is often held that the *right of possession*, necessary to maintain an action, is not acquired without *payment* or tender of the price.² Thus A., a hop-merchant, on several days in August, sold to B., by contract, various parcels of hops. Part of them were weighed, and an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was the second Saturday subsequent to the purchase. B. did not pay for the hops at the usual time, whereupon A. gave notice, that, unless they were paid for by a certain day, they would be resold. The hops were not paid for, and A. resold a part, with the consent of B., who afterwards became bankrupt, and then A. sold the residue without the assent of B. or his assignees. Account sales were delivered to B., in which he was charged warehouse rent from the 30th of August. The assignees demanded the hops of A., and tendered the warehouse rent, charges, &c.; and, A. having refused to deliver them, brought trover. The jury found that the defendant had not rescinded the sale. Held, the action could not be maintained, the plaintiffs not having a right of possession until they paid or tendered the price.³ So a quantity of hops was purchased from the defendants in April, 1831, the invoice of which contained the words "on rent." The hops remained in the sellers' warehouse, and a bill accepted by the buyer was afterwards given them at their request, which

¹ Morrison v. Gray, 9 Moore, 484; ² Bloxham v. Morley, 7 Dow. & R. 407.
³ Bloxham v. Sanders, 4 B. & C. 941.

they indorsed on getting it discounted. During the running of that bill, a part of the hops was delivered, in pursuance of the buyer's order to his sub-purchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonored at maturity. Held, that, though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the original buyer could not maintain trover for them, without actual payment of the price agreed on, as well as of the warehouse rent, he having only the right of property, without that of possession.¹ So the defendant agreed to sell to the plaintiff certain apples, to be taken and paid for by the latter on a given day. In the interim, the apples were deposited in a kiln within a *hoast-house*, the key of the kiln being delivered to the plaintiff, that of the *hoast-house* being retained by the defendant. The plaintiff making default, the defendant resold the apples. Held, that the plaintiff had not such a possession, as to entitle him to maintain trover against the defendant, for reselling before the lapse of a reasonable time.² So A., being possessed of an old vessel, sent her to B.'s yard to be repaired. B. agreed to find timber for the repairs, and materials were accordingly supplied by B. and other persons to the amount of £200. The vessel was repaired in B.'s yard with these materials, but no work was done upon her by either B. or the other creditors. On the vessel's being advertised for sale, B. and the other persons insisted that she should not be removed until they were paid. A.'s agent assented, and said that they should be paid out of the purchase-money, and signed an authority to the auctioneer to that effect. The sale then proceeded, and the vessel was knocked down to the plaintiff for £300. Immediately after the sale, B. and the other creditors applied to the plaintiff for payment, and he prom-

¹ Miles v. Gorton, 4 Tyr. 295.

² Milgate v. Kebble, 3 Scott, N. R. 358.

ised that he would, on a certain day, bring the purchase-money for the auctioneer to pay the creditors with, but failed to do so. Held, that the agreement for payment of the repairs out of the purchase-money, of which the plaintiff was cognizant, and to which he assented, precluded him from maintaining trover until such payment was made.¹ So A., the owner of flour, delivered it to a forwarder at Rochester, and took a receipt, expressing that the flour was to be sent to the defendant at Albany; he being the factor to whom A. usually consigned flour for sale, and A. being indebted to him for advances on previous consignments. A. on the same day drew upon the defendant against the flour, and procured the plaintiffs, a bank, at Rochester to discount the draft, on delivering to the bank the forwarder's receipt, and agreeing that the bank might hold it as security for the acceptance of the draft. The defendant refused to accept the draft, but subsequently received the flour and converted it to his own use, having notice of the transaction with the plaintiffs. Held, the defendant was liable in trover.² So, where one sold to the plaintiff a quantity of hops, to be paid for on delivery, and sent them to the defendants, who were forwarders and warehousemen, to be delivered to the plaintiff on payment; held, the title did not pass before payment, and the plaintiff, having neglected to make payment and receive the hops, for an unreasonable time after being notified of their arrival, could not maintain trover against the defendants, who shipped them to another market, in accordance with the orders of the vendor.³ And, on the other hand, the fact of payment is often relied upon, as effecting a change of possessory title. Thus, where A. agrees to sell horses to B., at a certain price, and B. pays the price, which A. accepts, and agrees to deliver up the horses; the sale is complete, and B., after demand and refusal, can maintain trover for the horses.⁴ So also the payment of *earnest*, more

¹ Norris v. Williams, 1 Cr. & M. 842.

³ Conway v. Bush, 4 Barb. 564.

² The Bank, &c. v. Jones, 4 Comst. 497.

⁴ Miller v. Koger, 9 Humph. 231.

especially if accompanied by a tender of the whole price. Thus in an old case, the plaintiff agreed to exchange The Folly, his own vessel, for The Roker, the defendant's, and to give twenty-five guineas to boot; and, if The Folly was lost in the voyage she was then upon, thirty guineas. The plaintiff also paid a guinea as earnest. The defendant wrote to excuse himself, that he could not make the exchange, because he had sold the vessel. The plaintiff then tendered twenty-four guineas, deducting one for earnest; but the defendant refused them. Afterwards, in another voyage, The Folly being lost, the plaintiff brings trover for the value. Held, the action will lay; for the delivery was complete by payment of the earnest, and the defendant's detention of the vessel afterward was tortious.¹ But, after delivery, non-payment of the price will not revert a title in the vendor. Thus, where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order, &c., he paying freight for the said goods according to charter-party; and the letter of advice also informed the consignee, that the consignor had drawn bills on him at three months for the value of the cargo: held, the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu* in case of the insolvency of the consignee. And, the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up, unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated; held, the consignee might main-

¹ James v. Price, Loft, 219.

tain trover against such agent, without having tendered payment of the freight either to him or to the captain, the defendant having possessed himself of the goods wrongfully.¹

26. But the principle, that payment is essential to a complete right of property and possession in the vendee, is held more especially applicable, where a sale is by its express terms not to be complete until payment of the price. Thus where a verbal condition is made, that property delivered to a vendee shall not vest in him until the price is paid, the vendor may bring trover, if the property is attached and sold by an officer on an execution against the vendee.² So where the defendant acknowledged in writing, that he had received a pair of oxen from the plaintiff, for the purpose of enabling him to perform certain work, which he had contracted to do for the plaintiff, and the writing contained a condition, that, when the job was completed, or at any time, if the plaintiff should choose, he should have the right to take the oxen, by paying the defendant for what he had done towards the work, and, on completion of the work, and on settling therefor, the oxen, with other property delivered on the same terms, were to be "turned in" in payment for the work; it was held, that the payment to the defendant was a condition precedent to the right of the plaintiff to take the oxen, and, without such payment, he could not maintain trover, though the defendant had sold them before the work was complete.³ So, where A. purchased land, under an agreement with his vendor that no timber should be cut until the land was paid for, and afterwards A. sold the timber to B., and transferred his interest in the land to C., with notice of the sale of the timber; held, B. could maintain case against C. for cutting the timber.⁴ But on a contract for the sale of a chattel *on credit*, time, without express stipulation, is not of the essence of the contract; and

¹ Walley v. Montgomery, 3 E. 585.

² Bennett v. Sims, 1 Rice, 421.

³ Walker v. M'Naughton, 16 Verm. 388.

⁴ Lillibridge v. Sartwell, 8 Barr, 523.

the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day.¹

27. Questions often arise in reference to property and possession, where a sale is indeterminate as to the precise number or quantity of goods sold, for want of selection or appropriation from a bulk, mass, or larger number of distinct but similar articles. So also, where the specific articles designed to be sold are not distinctly identified. Or where the contract is in its form or nature rather *executory* than executed; including contracts of *manufacture*. Thus an order, signed by A., for the delivery by the defendants, wharfingers, of twenty sacks of flour to the plaintiff, was lodged with and accepted by them in the usual course of business; they at the same time declaring they had but five sacks to spare, which the party might have, and which he received accordingly. On application for the rest, they declined to deliver it. In this action, of trover, it did not appear that the plaintiff knew that A. had any other flour in the defendants' possession, and the defendants did not produce any delivery orders, by which any such flour had been previously appropriated by A. Held, the action was maintainable, as the defendants had not limited their acceptance to any minor quantity of flour, or alleged that they must select the sacks to be delivered to the plaintiff.² So the defendant sold to the plaintiff 625 bags of corn, which was a portion of a larger quantity which the defendant had previously purchased, and which was to be delivered to the defendant at the railroad depot in Charleston; and the defendant gave to the plaintiff the following delivery order: "Mr. C. D., Agent Railroad Company: Sir, please deliver to (the plaintiff) 625 bags of corn, consigned to me, and oblige (the defendant). P. S. I am not certain that all the corn has arrived at the

¹ Martindale v. Smith, 1 Gale & Dav. 1.

² Gillett v. Hill, 4 Tyr. 290.

depot, but when it comes let (the plaintiff) have it. January 25, 1847." When the corn had arrived, the plaintiff tendered to the defendant the purchase-money, and demanded the corn, but the defendant refused to let him have it. Held, that the order sufficiently identified the corn, as being the first 625 bags that should arrive, and transferred to the plaintiff the right of property therein, and gave him such constructive possession as would enable him to maintain trover therefor, on demand and refusal.¹ But, where ten sacks of salt are bought with the funds of the plaintiff, and at the same time five with the funds of another person, and all are delivered, without any distinguishing marks, to the latter, from whom the defendant receives them and converts them to his own use; trover does not lie.² And in general trover does not lie to recover goods due under an executory contract.³ Thus an agreement to purchase property for another, no funds being furnished, and no general agency existing, vests no title in such other person, and, if he takes the property forcibly, he is liable in trover.⁴ So, where the plaintiff and A. entered into an agreement, which stated that the plaintiff had bought of A. a certain quantity of timber, which the plaintiff was to pay for at the measurement in the city of New York, when it was delivered; and the plaintiff also agreed that the amount of the timber should be indorsed on notes which he held against A.; held, this agreement was executory, and did not vest the property in the timber in the plaintiff, who, therefore, could not maintain trover against a third person for the conversion of it.⁵ So the defendants contracted to sell to K. fifty hogsheads of sugar, called double loaves, at 100s. per cwt., to be delivered free on board a British ship. K. sold to the plaintiff by the same description, and the defendants assented to the re-sale, the sugar not having been delivered

¹ *Sahlman v. Mills*, 3 Strobb. 384.

⁴ *Paige v. Hammond*, 26 Verm. 375.

² *Hill v. Robison*, 3 Jones, Law, 501.

⁵ *M'Donald v. Hewett*, 15 Johns. 349.

³ *Wood v. Atkinson*, 2 Murph. 87.

or weighed. Held, the plaintiff could not recover for it in trover.¹ So, where the defendant agrees generally to make three lumber wagons for the plaintiff within a given time, and deliver them, and he completes but does not deliver them; no title passes, and replevin will not lie, but the remedy is a suit on the contract.² But, where an unfinished sleigh was in the shop of a painter, who was to finish it by a time specified; and the owner of the sleigh went to the shop with the plaintiff, and there sold the sleigh to the plaintiff at a price agreed upon; and no payment was made, nor the sleigh then actually delivered to the plaintiff, but it was agreed that it should be when finished, and the painter, who was present, was directed and agreed so to deliver it; held, the plaintiff might maintain trespass against a sheriff, who attached and took away the sleigh before it was finished, on a writ against the vendor.³ So A. and B. entered into a contract in writing, that A. would deliver to B., at his factory, from time to time, as might be required to keep the factory in operation, a specified quantity of wool; that B. would manufacture the wool into cassimeres, and deliver the cassimeres so manufactured to A. at the factory, from time to time, as they should be finished and ready for market; that A. should send the cassimeres to market and have them sold, and pay to B., for manufacturing, the balance of money obtained for them, after deducting 44 cents for every pound of wool so delivered by A., and the interest and cost of freight; that A. should pay to B. one third of the money received in advance for the cassimeres, for the purpose of defraying the expense of manufacturing; that A., before sending the cassimeres to market, might take one ninth of the number of yards at 90 cents per yard; and that B. would also manufacture for A. another lot of wool of about 5,000 pounds, upon receiving notice within two weeks that A. so desired. Held,

¹ *Austin v. Cravan*, 4 Taunt. 644.

² *Updike v. Henry*, 14 Hill, 378.

³ *Willard v. Lull*, 17 Verm. 412.

the property in the cloth was in A., and he had the right to the possession of it as fast as it was manufactured, and might sustain trover against B. and one to whom B. had sold a portion of the cloth, to recover for the cloth so sold.¹

28. As a necessary result of the principles already stated, it may be added, that a *conditional* or *qualified* sale and delivery will not divest the seller of his possession, so as to prevent his maintaining a possessory action against a party who interferes with the property. More especially where payment has not been made. Thus the plaintiffs, machinists in Connecticut, contracted to furnish B. with a paper-making machine, to be put up by them in B.'s mill in Worcester; and, if it worked to B.'s satisfaction, he was to pay for it, otherwise the plaintiffs were to take it away. It weighed about eight tons, and B. was to cart it from Connecticut to Worcester. The plaintiffs accordingly set it up, in a new mill adapted purposely to the dimensions and structure of the machine, and, before the setting up of the machine was completed, and while some of its essential parts were wanting, it was put in operation for experiment, but did not work advantageously and to the satisfaction of B.; and on the same day on which this trial was made it was attached as the property of B. Held, that the property had not been transferred to B., and that the plaintiffs had sufficient possession to maintain trespass against the attaching officer.²

29. The question of the right of possession also arises, in case of transfers *for security of debts*. Thus, where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession until default in payment at the time stipulated, and then to sell them; the assignee has sufficient possession to maintain trespass against a wrongdoer.³ So an indenture was executed between A. and B., setting forth that, B. having become surety

¹ Buckmaster v. Mower, 21 Verm. 204.

³ White v. Morris, 11 Com. Bench, 1015.

² Phelps v. Willard, 16 Pick. 29.

for A. for £600, due from A. to C., in consideration of C.'s forbearing proceedings against A., A., for the purpose of securing B., in case he should be required to pay C., had executed a bond to B., conditioned for the payment to B., his executors, &c., of £600 on a certain day; and that, for the better securing B., A. had agreed to grant, &c., his household goods and effects, &c., to B.; and that A., in consideration of B.'s having become such surety, granted unto B. his said goods and effects, &c., but to be void on payment to C. of £600, with interest, on a given day; with a covenant by A. to pay the £600 and interest to C., and to indemnify B., his executors, &c., from the payment thereof, a covenant by A. for quiet enjoyment by B. in case of default, a covenant to insure, and a power of sale for payment to C. of the £600 and interest. Held, that B. might maintain trespass against the sheriff for seizing these goods under a *fi. fa.* against A., notwithstanding that up to the time of the seizure they remained in A.'s possession.¹ But where A., being indebted to B., by a *bona fide* bill of sale conveyed to him all his stock in trade, household furniture, &c., with a covenant to pay the debt on demand, and a proviso for redemption on payment of the debt and interest on demand, and also that the assignor should continue in possession until default; the goods having before any demand been seized under a *fi. fa.* against A.; held, B. had not a sufficient right of immediate possession to maintain trover.²

30. A purchase of property *by an agent*, more especially if made in the name of the principal, will give to the latter a possession sufficient to maintain an action for the wrongful taking of the property. Thus, by an agreement between a father and his son, the plaintiff, the father was to carry on business in the name and on the account of the son, and as his agent, and the son was to give to the father one half of the profits as a compensation for his services; but the busi-

¹ *Watson v. Macquire*, 5 Com. Bench, 836.

² *Bradley v. Copley*, 1 Com. Bench, 685.

ness did not yield any profits, and no settlement of accounts was ever made between them. A former, separate creditor of the father having attached certain property, purchased by the father in the name of the son under this agreement, it was held that trover might be maintained by the son against the attaching officer.¹ (a) But it is also said, "It is not true, that in cases of special property the party must once have had possession in order to maintain trover; for a factor, to whom goods have been consigned, and who has never received them, may maintain such an action."² So, where the owner of goods delivers them to his agent to keep, and they are taken from the agent by third persons, the owner may maintain trespass.³ Thus, where A. owned lumber in and about a mill, and mortgaged it to the plaintiff and B., who had the possession and charge of it, and the plaintiff went to the mill to take possession, and desired B. to take possession for him, and to take charge of it as he had done before, to which B. made no objection; and a son of the mortgagor, as his agent, accompanied the plaintiff for the purpose of giving him possession; held, the plaintiff might maintain trespass against the defendants, who showed no title.⁴ So the gratuitous lender of a chattel may maintain trespass against the officer and plaintiff, in a suit against the borrower, for an attachment of such chattel.⁵ So a servant, put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own occupation, in an

¹ *Blanchard v. Coolidge*, 22 Pick. 151.

² *Per Eyre, C. J., Fowler v. Down*, 1 B. & P. 47.

³ *Thorp v. Burling*, 11 Johns. 285.

⁴ *Morse v. Pike*, 15 N. H. 529.

⁵ *Overby v. Magee*, 15 Ark. 459.

(a) On the other hand, a servant or agent may maintain an action on the ground of possession, though he has no right of property. Thus a master of a fly-boat, who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was being towed along an inland navigation, although the vessel and the rope were the property of the company. *Moore v. Robinson*, 2 B. & Ad. 817.

action on the case, for a disturbance of a right of way over the defendant's close to such cottage. And it matters not that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent.¹ So one claiming land under color of title, who puts a servant into a house upon the land, with the privilege of getting fire-wood therefrom, is, as against a wrongdoer, in possession of the whole tract, and may maintain trespass for the cutting of timber thereon.² But where the plaintiff, a prisoner, assigned all his effects under the insolvent debtor's act, June 17th; and his wife continued to reside in his house, retaining some of the furniture; and, on the 9th of July, the wife having been absent for two days, and no one being in the house, the defendant committed a trespass in an attempt to distrain for rent; held, the wife had not a sufficient possession to enable the plaintiff to sue in trespass.³

31. In general, *possession* and *change of possession* are questions of fact for the jury. But where, in trespass against a constable and others, for taking a horse alleged to belong to the plaintiff, by virtue of an execution against A., the plaintiff's brother, it appeared in evidence that the horse belonged to A., who sold him to the plaintiff, before the execution, for a full price; that the plaintiff and A. lived together; and that after the sale the plaintiff kept the horse in the same stable in which A. had kept him; and there was no evidence of any actual change of possession; held, it was error for the Court to leave it to the jury to say, from the evidence, whether or not the possession was changed.⁴

32. Title *by execution* may also be the foundation of an action founded on legal possession. Thus, in trespass *quare clausum*, if the land was purchased by the plaintiff at sheriff's sale, and was vacant at the time of the sale, and when the sheriff's deed was executed; he may recover without taking

¹ Bertie v. Beaumont, 16 E. 33.

² Lamb v. Swain, 3 Jones, Law, 370.

³ Topham v. Dent, 6 Bing. 515.

⁴ Hoffner v. Clark, 5 Whart. 545.

actual possession.¹ So the purchaser of an equity of redemption, sold on execution, which had been attached on the writ, takes a right of immediate possession, which enables him to maintain trespass *quare clausum* against a party, claiming under a conveyance made by the debtor since the attachment.²

33. In accordance with the general rule, that possession raises a presumption of title, where goods are taken upon execution while in the actual possession of the defendant in the execution, and are replevied by a person claiming to be the owner, the *onus* of proving that they are his property rests upon the plaintiff. Otherwise, if the goods were not in possession of the defendant. And the plaintiff in replevin has a right to go to the jury upon the question as to the actual possession.³ But, in reference to real property, a plaintiff in trespass to try title, who claims under a sale by the sheriff, must show a title in the execution debtor; and the judgment sale and conveyance by the sheriff, with proof that the party was in possession, and was the reputed owner at the time of the sale, are not sufficient to put the defendant to show a better title. But any evidence, which would have protected such party in a suit against him for the recovery of the land; as, for instance, proof of adverse possession for the time required by the statute of limitations; will sustain the action.⁴ (a)

¹ *Raub v. Heath*, 8 Blackf. 575.

³ *Merritt v. Lyon*, 3 Barb. 110.

² *Abbott v. Sturtevant*, 30 Maine, 40.

⁴ *Sims v. Randal*, 1 Brev. 85.

(a) An authenticated copy of the judgment, and the original execution, are admissible evidence. *Stevellie v. Laury*, 2 Brev. 135.

But the sheriff's return to the execution cannot be received in evidence to contradict his deed, by showing that there has been no sale; and evidence that the purchase-money had not been paid is also inadmissible. *Hairston v. Hairston*, 1 Brev. 305.

But, in an action of trespass to try title, a subsequent purchaser at sheriff's sale may show, that a prior sheriff's sale was fraudulent and void, although there had been no proceeding in equity setting aside such prior sale. *Martin v. Ranlett*, 5 Rich. 541.

34. With regard to mere constructive possession, either by deed or otherwise, it is an important qualification to the right of action thereby acquired, that prior constructive possession must yield to subsequent actual adverse possession.¹ (a) Thus, where the plaintiff entered upon a tract

¹ Davis v. White, 1 Williams, 751.

The action of trespass to try titles cannot be sustained, on a sheriff's deed bearing date subsequently to the commencement of the action, although the sale was previous to that period. *Bank, &c. v. South Carolina, &c.* 3 Strobb. 190.

But, under a plea of *liberum tenementum*, in trespass *quare clausum*, the plaintiff, who claimed title under a decree of sale as purchaser thereunder, was allowed to prove the decree and sale, which were prior to the trespass for which the action was brought, although the ratification of the sale and the deed to the plaintiff were subsequent to such trespass. *Hunter v. Hatton*, 4 Gill, 115.

(a) Where each of the parties, in an action of trespass *quare clausum fregit*, claimed title when the acts complained of were done; and the defendant further claimed, that, if the legal title was in the plaintiff, he, having disseized the plaintiff, was then in exclusive possession; whereupon the Court charged the jury, that, if the plaintiff had been disseized, and was not in possession when the acts were done, he could not maintain this action; and further, that, if the plaintiff had title at the time, his having been previously disseized and dispossessed thereof by the defendant would not prevent his recovery in this action, provided he had, previous to such acts of trespass, regained and retaken possession, so that he was in possession at the time the acts of trespass were committed; that, although a simple reëntry would not revest the possession in him, yet if, as he claimed, he went upon the land, and as owner thereof retook possession and remained there for some two or three days, cutting and carrying away the wood and timber, keeping the defendant out of the possession, and forbidding him from entering upon the same; such a retaking of possession would enable him to maintain this action for any act of trespass committed by the defendant at any time thereafter: it was held, that, taking the whole charge together, it did not dispense with possession by the plaintiff at the time of the alleged trespasses; nor assert that the acts of the plaintiff constituted, as *matter of law*, a retaking of the possession by him; consequently, that, after a verdict for the plaintiff, a new trial ought not to be granted for a misdirection. *Payne v. Clark*, 20 Conn. 80.

of land on which was a house which had never been occupied, under claim of title, nailed up the windows, and put into it some old boards, and, a year afterwards, the defendant entered, tore off the boards, and rented the house, and finally moved the house off. Held, the plaintiff had not such a possession, without reëntry, as would give him an action of trespass against the defendant.¹ So purchasers of land cannot, by any act of their own, gain such possession, as will enable them to maintain trespass against those in the adverse possession of the premises.² Thus a town, having no title to land besides a survey thereof, and an entry thereon under a claim of title, conveyed the land to the plaintiff by deed of warranty, and the plaintiff sued the defendant for a subsequent trespass upon the land. Held, the action could not be maintained, if the defendant, prior to the entry and deed, had possession, claiming title.³ So an action of trespass *quare clausum*, to recover mesne profits, will not lie in favor of a disseizee, unless he has regained the possession *by entry*.⁴ So the plaintiff, who had built a chapel, conveyed it to the defendant by a deed, the validity of which was questionable. The defendant took possession, and gave the key to a gardener, who, with his permission, lent it to the plaintiff to preach in the chapel. The plaintiff thereupon locked the chapel, and refused to redeliver the key. Held, that he had not sufficient possession to maintain trespass, the defendant having broken open the chapel.⁵ And a similar principle has been applied in a case of personal property. Thus goods are sold by the defendant to the plaintiff, to be paid for by instalments, the balance to be paid before removal. The defendant allows the plaintiff to place the goods under lock and key upon the defendant's premises, and delivers the key to the plaintiff, but retains the key of the external enclosure. The balance being unpaid, the plaintiff has not such a pos-

¹ *Patterson v. Bodenhammer*, 11 Ired. 4.

² *Sigerson v. Hornsby*, 14 Mis. 71.

³ *Williston v. Morse*, 10 Met. 17.

⁴ *Fry v. The Branch Bank*, &c. 16 Ala. 282.

⁵ *Revett v. Brown*, 5 Bing. 7; 2 Moo. & P. 12.

session, as will entitle him to maintain trover against the defendant, upon a wrongful removal and sale of the goods.¹

35. In further illustration of the general proposition, that possession rather than title is the legal foundation of an action for tort, it may be added; that, while damages for a wrongful entry on land by a *disseizor* may be recovered, although the owner has not regained possession when the suit is brought;² the owner of land cannot maintain such action against a disseizor in actual possession, after a mere formal entry, and more especially pending a writ of entry against the disseizor.³ Nor, after an ouster, can the plaintiff recover damages for subsequent trespasses, without a reëntry; but, after reëntry, he may lay his action with a *continuando*, and recover for mesne profits as well as damages for the ouster,⁴ together with damages for a subsequent entry by the defendant.⁵ So, where a remainder-man enters upon a party, who is in possession by intrusion; trespass lies against the intruder, although he retain the actual possession.⁶ So, if a disseizee lawfully enters upon the land and exercises acts of ownership thereon, he thereby regains the possession, sufficiently to entitle him to maintain an action of trespass against the disseizor for his subsequent entry.⁷ And an entry upon the land, measuring the lines, asserting thereupon his claim of title, and directing his agent to cut the grass, with notice to the disseizor or trespasser, constitutes a sufficient reëntry by the owner, to enable him to recover damages, in an action of trespass, for the value of the grass which the disseizor subsequently cut upon the land.⁸ (a) So

¹ *Milgate v. Kebble*, 3 M. & Gr. 100.

² *Cutting v. Cox*, 19 Verm. 517;

³ *Gilchrist v. McLaughlin*, 7 Ired. 310.

King v. Baker, 25 Penn. 186.

⁴ *Butcher v. Butcher*, 1 M. & Ry.

⁵ *Chadbourne v. Straw*, 9 Shep. 450.

220.

⁶ *Stean v. Anderson*, 4 Har. 209.

⁷ *Putney v. Dresser*, 2 Met. 583.

⁸ *Cutting v. Cox*, 19 Verm. 517.

(a) But, where the defendant was owner in fee of land of which the plaintiff in replevin had disseized him, and had sown wheat thereon, and after the disseizin the defendant reëntered, and was in the actual and lawful

any acts of ownership on the land, as ploughing it, or the like, or a formal declaration of the intention accompanying the entry, will maintain an action of trespass.¹ (a) And the levy of an execution on land which is not the judgment debtor's, even though followed by acts of constructive possession, does not work such a disseizin of the true owner, as will prevent his maintaining an action of trespass, without reëntry, against the judgment creditor or those acting under him. Thus, where the land was part of a large unenclosed meadow, and the judgment creditor entered thereon two or three times for the purpose of showing the grass for sale, but took no actual possession; and afterwards advertised a sale of the grass in a public newspaper, as grass growing on his land, and caused the same to be sold at auction, at a distance from the land; and the purchaser thereof cut and carried it away, the true owner of the land having no actual notice of the proceedings: held, the owner might maintain trespass against the purchaser of the grass.² (b)

36. Where the owner of land has been disseized for six

¹ Byrum v. Carter, 4 Ired. 310.

² Blood v. Wood, 1 Met. 528.

possession of the land and the wheat as his own property; held, the plaintiff had no right to immediate possession of the wheat, and could not maintain replevin. Hooser v. Hays, 10 B. Mon. 72.

(a) But although such entry be made, yet, if the wrongdoer continue his possession, the deed of the owner, not being made on the land, and such adverse possession continuing, is not valid to pass a title. 4 Ired. 310.

(b) The plaintiff recovered judgment, in a case, of unlawful detainer, against B., for a tract of land in the possession of B.'s tenant, the defendant, and the sheriff delivered the plaintiff constructive possession on a writ of *habere facias*, since which the plaintiff's tenant had farmed the land. B. afterwards obtained a *supersedeas* of the judgment, and the defendant refused to deliver the landlord's share of the crop to the plaintiff, but delivered it to B., notwithstanding he had, previously to the *supersedeas*, and on the plaintiff's request, promised the plaintiff to deliver it to him. Held, the plaintiff could not maintain trespass against the defendant therefor, and the execution of the writ of *habere facias* gave the plaintiff no possession as against the defendant. Kretzer v. Wysong, 5 Gratt. 9.

years, and has brought a writ of entry, and the disseizor has put in his claim for improvements made by him, and the amount has been found by the jury, and the owner has elected to retain it and pay for the improvements; the disseizor should not be made accountable for timber trees cut upon the land during the disseizin by another without his consent or connivance; and, if the timber thus cut has come into possession of the owner, and is afterwards taken from him by the disseizor, he may maintain trespass against the disseizor for such taking during the pendency of the writ of entry.¹

¹ *Brown v. Ware*, 25 Maine, 411.

CHAPTER XI.

NUISANCE.

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| 1. General nature of this, as distinguished from other wrongs; action on the case, bill in equity, &c.
3. What constitutes a nuisance.
4. Misuse of a party's own property; acts authorized by law or statute.
5. Private action for a public nuisance.
6. Nuisances to health, and comfort or safety. | 7. To morals, public order, &c.
8. Obstruction of highway.
9. Noise.
10. Ferocious dogs and other animals.
15. Parties to an action.
16. Continuance of a nuisance.
17. Remedy in equity—injunction.
18. Abatement.
19. Lapse of time—prescription. |
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1. For the reasons already explained, (vol. 1, p. 511,) first in order among injuries to property, we proceed to consider *Nuisance*. Much that would be appropriate to this title has already been stated, in the chapter (chapter 3) relating to the necessary elements of actions in general, or the essential ingredients of those wrongs, for which actions may be maintained. (a)

(a) It will be seen at once, that this preliminary inquiry must necessarily involve many considerations more specially applicable to the present title, *cause of action* and *nuisance* or *injury* being almost equivalent or synonymous expressions.

Nuisance, in its largest sense, signifies "anything that worketh hurt, inconvenience, or damage." 3 Bl. Comm. 215.

"All the acts put forth by man, which tend directly to create evil consequences to the community at large, may be deemed nuisances, where they are of such magnitude as to require the interposition of the Courts." 2 Bish. on Crimes, § 848.

The word is sometimes used as equivalent to *tort*, and applied as well to wrongs against the person or personal property, as against real estate. 3 Stark. Ev. 979. While by other writers it is restricted to acts "injuriously affecting the lands, tenements, or hereditaments of an individual." 2 Greenl. Ev. § 465.

2. One prominent characteristic of a *nuisance*, technically so called, is, that it is to some extent an *undefined* injury. Thus it is *indirect* or *remote*, as distinguished from an immediate invasion by one man of another's property; and for this reason the proper subject of an action on the case, which is a remedy appropriate to the misuse of a party's own right or property, to the damage of his neighbor; and not of trespass or trover, which lies for an unlawful taking or conversion of the property of another. And for another reason, the injury of nuisance is of a more comprehensive or miscellaneous character than any other; namely, that it relates to rights not in their nature specific, definable, or tangible, but incident to or growing out of corporeal property, and, in part on account of this incorporeal character, varying with the diverse circumstances of individual cases. Hence the origin of the legal phrase—action on the case; which means an action not falling within the ancient and technical formulas, but adapted to the particular case which arises, and which otherwise would be without remedy. (a) Thus it is

(a) "The action on the case is so termed, as distinguishing the remedy from the *brevia formata*. In its most comprehensive signification, it includes *assumpsit* as well as an action in form *ex delicto*; but at the present time, when an action on the case is mentioned, it is usually understood to mean an action in form *ex delicto*." 1 Chit. Pl. 135.

"At a very early period specific forms of actions were provided for such injuries, as had then most usually occurred; and Bracton, observing on the original writs on which our actions are founded, declares them to be fixed and immutable, unless by authority of parliament." 8 Bl. Comm. 117. But, to meet "like case falling under like law, and requiring like remedy," but not coming within the established forms, an ancient statute (Westminster, 2d, 13 Edw. I. c. 24) authorized the clerks in chancery to make a writ or "adjourn the plaintiffs until the next parliament; and by consent of men learned in the law, a writ shall be made." 2 Bl. R. 1113; 8 Woode. 168; Webb's case, 8 Co. 45 b.

With reference to the distinction between a nuisance and other wrongs to property, as connected with the *remedy*; it may be added, and will be more fully stated hereafter, that an injunction in equity, which partakes more of the character of the action on the case than any other action at

said, "Actions on the case are founded on the common law, or upon acts of parliament, and lie generally to recover damages for torts, not committed with force actual or implied, or having been occasioned by force, where the matter affected was not tangible or the injury was not immediate but consequential, or where the interest in the property was only in reversion. Torts of this nature are to the absolute or relative rights of persons or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion."¹

3. In reference to the general question, what constitutes a nuisance, technically so called; a precise definition is of course impracticable, and the law is best explained by the particular instances of annoyance or injury, which have been adjudged to be, or not to be, nuisances. The following criterion has been suggested by high authority: "Is the inconvenience more than fanciful, or one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people."²

4. As has been already, in other connections, explained, one of the characteristics of nuisance, as distinguished from trespass or conversion, is, that it consists in a use of one's own property, which involves injury to the property or other right or interest of his neighbor. And the principle is laid down, that, if one carry on a lawful business in such a manner as to prove a nuisance to his neighbor, he is answerable for the damages.³ But it is also said, that which is

¹ 1 Chit. Pl. 135.

² Per Knight Bruce, V. C., *Walter v. Telfe*, 4 DeG. & S. 315.

³ *Fish v. Dodge*, 4 Denio. 311.

law, is a familiar process to prevent or restrain nuisances; while it is very rarely allowed for a mere trespass. This difference is usually predicated upon the ground, that a nuisance is ordinarily continuous, while a trespass commonly consists of a single act.

authorized by an act of the legislature cannot be a nuisance.¹ Neither an injunction nor an action will lie, to redress a consequential injury, necessarily resulting from the lawful exercise of a right granted by the sovereign power of the State, or authorized by competent municipal authority.² Thus it is held, partly upon this ground, that a railroad in the streets of a city or village is not *per se* a nuisance.³ (a) So, where commissioners, appointed under an act of the legislature to drain swamp lands, are acting in good faith, and are not violating the plain and manifest intent of the statute, a Court would not be justified in restraining their proceedings by injunction.⁴ And where a railroad corporation was authorized by the municipal authorities of a city to build a tunnel through the city, a preliminary injunction was refused to an owner of adjoining land, on the allegation by him that it was a nuisance.⁵ So it has been held, that equity will not enjoin a turnpike company from taking the complainant's land for their road, where the only question involved is the constitutionality of the act incorporating the company; but

¹ Per Hand, J., Trustees, &c. v. Utica, &c. 6 Barb. 313.

² Williams v. The New York, &c. 18 Barb. 222.

³ Ibid.

⁴ Hartwell v. Armstrong, 19 Barb. 166.

⁵ Hodgkinson v. Long Island, &c. 4 Edw. Ch. 411.

(a) It is said, in a very recent case, "The public have a right to the maintenance of streets and roads as common highways, subject to restriction by the legislative power of the Commonwealth. There is no longer any reason for controversy as to the right of the legislature to grant the use of them to companies proposing to facilitate the transit of the public along them. This is settled definitively in the cases of *The Philadelphia and Trenton Railroad Company*, 5 Wharton, 25, and *The Commonwealth v. The Erie and Northeast Railroad Company*, 3 Casey, 339." Per Thompson, J., *Musser v. The Fairmount, &c.*, Am. Law Reg. March, 1859, p. 285.

But in the same case it was decided, that where a statute, incorporating a City Passenger Railway, required the previous consent of the city councils to use or occupy the streets, and the councils by an ordinance disapproved the statute and declined to permit such use; the privilege was thereby nullified, the power designated by the act being exhausted, and not subject to be exercised by a subsequent conditional approval of the councils. *Musser v. The Fairmount, &c.*, Am. Law Reg. March, 1859, p. 284.

will leave the party to his remedy at law.¹ Nor will the Court restrain the erection and continuance of a lamp-post and lamp in front of or near a dwelling-house, upon the ground that it is a nuisance to the owner or inhabitants, unless the fact that it is so is clearly established by proofs. Whether such an erection shall be permitted or continued, rests in the discretion of the corporation of the city having jurisdiction of the subject, and, when no special injury is shown, the Court has no right to restrain the exercise of this discretion.² But the abuse of a corporate charter for purposes which it does not contemplate will subject the corporation to an injunction as for a nuisance. Thus a railway company became, by conveyance from a canal company, the owner of a canal, with lands, acquired from several owners for the formation of a reservoir, from which to supply water to the canal; the rights of fishing and sporting over the reservoir, but no other use, being reserved to the former owners. The company projected and held a regatta with aquatic sports on the reservoir, ran cheap trains, and thereby congregated a large concourse of persons, who trespassed on the park surrounding the mansion-house of the plaintiff, and adjoining the reservoir, and injured her right of fishing and sporting over the greater part of the reservoir. Notwithstanding her remonstrances, the company announced a second regatta. Upon motion on her behalf, in the suit by her against the company, the latter undertaking not to hold another regatta for a limited period, the Court permitted the plaintiff to try her right at law against the company. On a trial at law, the jury, not agreeing, were discharged; but, on a second trial, a verdict was given for the plaintiff, with nominal damages. The undertaking having expired, the company announced another regatta on the reservoir. The plaintiff again moved an injunction. Held, that the regatta was a nuisance to the plaintiff's property, and an injunction was granted to restrain the defendants from hold-

¹ *Troth v. Troth*, 4 Halst. Ch. 237.

² *Parsons v. Travis*, 1 Duer, 439.

ing the regatta; and the Court directed an issue, to try whether the company could use the reservoir for any other purpose than to supply their canal with water.¹ So it is held, that a citizen of New York, owning property in Ohio, has a right to come into the Circuit Court of the United States, and enjoin a railway company, incorporated under the laws of the latter State, from doing acts which would produce an irreparable injury to his property situated there. Thus a person owning a tannery, saw-mill, flouring-mill, a store and warehouses, a wharf and water-lots, on a river navigable for steamboats, schooners, and other vessels, and on which a commerce is carried on with different ports, shipments of flour and lumber from his mills and leather from his tannery being constantly made; and who owns stock in a plank road, which pays a profit by the transportation of produce to and from the place where his property is situated; may enjoin a railway company from materially obstructing the navigation of the bay into which the river discharges.² And it is to be further observed, that, while acts done under authority of law are *primâ facie* not to be treated as nuisances, so, on the other hand, a prohibition by public authority makes the thing prohibited *primâ facie* actionable. Thus, where a city, by its charter, has power to remove all nuisances, the action of the common council, in declaring a certain house to be a nuisance, because its dilapidated condition endangers the lives of passers-by, is *primâ facie* evidence of the fact, and throws the burden of disproving it on the party complaining of the act of the city, in directing the building to be taken down.³ And chancery has jurisdiction to enjoin and abate a public nuisance, caused by the obstruction of a highway; though the town, within which the nuisance is erected, has been invested by act of the legislature with power to abate nuisances within its limits;

¹ *Bostock v. North Staffordshire, &c.*
19 Eng. Law & Eq. 307.

² *Works v. Junction Railroad*, 5
McLean, 425.

³ *Montgomery v. Hutchinson*, 13 Ala
573.

unless there be an express provision to the contrary.¹ And an act of assembly, legalizing, for the time being, erections already existing in a borough, and being then nuisances, may be afterwards repealed by the assembly.² (a) So, where the board of health of a city adjudge certain premises to be a nuisance, and an ordinance of the corporation is thereupon passed directing its abatement; in an action of trespass against the corporation, for the act of an agent in carrying the ordinance into effect, the plaintiff is not at liberty to show that the nuisance did not in fact exist at the time of the adjudication; or, on the part of the board of health, any irregularity or non-compliance with the requirements of the statute in such case.³

5. We have already (chapter 2) briefly considered the

¹ *Hoole v. Attorney-General*, 22 Ala. 190.

² *Van Wormer v. The Mayor, &c.* 15 Wend. 262.

³ *Reading v. The Commonwealth*, 11 Penn. 196.

(a) Similar questions often arise upon *indictment*. Thus, where one act gave a company power to make a railway, and another, unqualified power to use locomotive steam-engines thereon, and the railway was constructed in some parts within five yards of a highway; upon an indictment for a nuisance, alleging that horses passing along the highway were terrified by the engines; it was held, that the proceedings complained of must have been sanctioned by statute, and the benefit derived by the public from the railway showed the reasonableness of the privilege granted. *Pease's case*, 4 B. & Ad. 30.

But where the defendant, proprietor of a colliery, without authority of parliament, made a railway from his colliery to a seaport town, upon the turnpike road, which in some places it narrowed so that there was not room for two carriages to pass, although he gave the public, for a toll, the use of the railway; held, indictable. *Morris's case*, 1 B. & Ad. 441.

So it is an indictable nuisance, for a gas company to open trenches in the public streets of a populous town, for the purpose of laying their pipes, although they use reasonable dispatch in laying down the pipes and restoring the road. *Regina v. Sheffield, &c.* 22 Eng. L. & Eq. 200.

And it is no defence to an indictment for exercising a noxious trade in a public place, that the selectmen have not assigned a place for the exercise of the trade, as they may do by statute. *The State v. Hart*, 34 Maine, 36.

general proposition, that for a *public nuisance* a private action cannot be sustained, without proving special and peculiar damage to the plaintiff. As to the nature and degree of such damage, it has been held, that being delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to maintain an action against the obstructor.¹ So a declaration is sufficient, that the plaintiff, before and at the time of committing the grievance, was navigating his barges, laden with goods, along a public navigable creek, and the defendant wrongfully moored a barge across, and kept the same so moored, from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, *per quod* the plaintiff was obliged to convey his goods a great distance over land, and thereby put to trouble and expense.² But simply cutting off the facilities of a party, for making a new entrance to his lot from a public street, is not sufficient actual damage to justify a private action.³ And it may be added, in illustration of the general rule, that an *injunction* to prevent a public nuisance is never granted on the application of a private individual, unless the apprehended nuisance would be specially dangerous to himself or injurious to his property,—an injury distinct from that which he suffers in common with the rest of the public.⁴ Thus, where a bill in equity was brought by an individual against a railroad company, alleging, that the defendants were engaged in extending their road across a certain cove, which is an arm of the sea, in which the tide ebbs and flows, communicating with the ocean through a navigable river; that the waters of the cove are navigable, and from time immemorial have been used and enjoyed as such; and that the plaintiff, and all other persons, have been accustomed to

¹ Greasley v. Codling, 2 Bing. 263.
See Cole v. Sproul, 35 Maine, 161.

² Rose v. Miles, 4 M. & S. 101.

³ McLauchlin v. Charlotte, &c., 5 Rich. 583.

⁴ Smith v. Lockwood, 13 Barb. 209.

pass and repass, at their pleasure, up and down the cove, into the river, to the ocean or elsewhere, in boats, schooners, or other vessels, without molestation or obstruction; and that by means of the road so extended, the navigation of the cove will be greatly obstructed, and rendered almost wholly useless:—it was held, that the case stated was that of a public nuisance. And, although the bill stated, also, that the plaintiff resided near the head of the cove; that the right to navigate the cove was a common right, the enjoyment of which was valuable to him in respect to trade and commerce, the building and launching of vessels, and for agricultural purposes and fisheries; and that he was in danger of being deprived of his lawful right to navigate the cove;—it was held, that the injury complained of was not one peculiar to the plaintiff, but common to him and all others having occasion to use the cove for such purposes.¹ (a)

6. Upon the question, what constitutes a nuisance, it may be remarked, that everything which is indictable as such may properly come under this general description, although most public nuisances, for the very reason that they are public, cannot be made the ground of an action for damages. But, inasmuch as they are sometimes liable to abatement or injunction by individuals, it is unnecessary to discriminate precisely between the two classes of nuisance. In general it may be said, that any injury to lands

¹ O'Brien v. Norwich, &c. 17 Conn. 372.

(a) On the other hand, in an indictment for nuisance, the objection may be taken, that the injury is merely private and not public. Thus, where a tinman was indicted for the noise made by him in carrying on his trade, and it appeared that it only affected the inhabitants of three sets of chambers in Clifford's Inn, and that the noise might be partly excluded by shutting the windows; it was held that an indictment would not lie, the annoyance, if anything, being but a private nuisance. Lloyd's case, 4 Esp. 200.

or houses, which renders them useless or even uncomfortable for habitation, is a nuisance. Thus, in regard to offensive odors, it is said, the neighborhood has a right to pure and fresh air. And a smell need not be *unwholesome*, if it is offensive, and renders the enjoyment of life and property uncomfortable; as by giving many persons headaches.¹ So, with reference to nuisances in violation of *decency*, that, whatever place becomes the habitation of civilized men, there the laws of decency must be enforced.² (a) Thus a

¹ Neil's case, 2 C. & P. 485; White's case, 1 Burr. 333; Howard v. Lee, 3 Sandf. 281. ² Per M'Donald, C. B., Crunden's case, 2 Camp. 89.

(a) The following establishments or occupations have been held public nuisances :—

A smith's forge. *Bradley v. Gill*, Lutw. 69.

A privy. *Styan v. Hutchinson*, 2 Selw. 1047.

A pig-stye. *Aldred's case*, 9 Co. 59.

A lime-kiln. *Ibid.*

A tobacco-mill. *Jones v. Powell*, Hutt. 136.

Making candles by boiling stinking stuff. *Tohayle's case*, Cro. Car. 510.

A manufactory for spirit of sulphur, vitriol, and aquafortis. *White's case*, 1 Burr. 333.

A tannery. *Pappineau's case*, 2 Str. 686.

Conveying gas into a river, thus destroying the fish, and making the water unfit to drink. *Medley's case*, 6 C. & P. 292.

Exposing one who has the small-pox in public. *Vantandillo's case*, 4 M. & S. 73.

A common provision dealer, selling unwholesome food, or mixing noxious ingredients with it. *Dixon's case*, 3 M. & S. 11.

Common stages for rope-dancers. *Hawk. b. 1, c. 75, § 6.*

Pigeon shooting. *Moore's case*, 3 B. & Ad. 184.

It has been held no offence against the law, to utter loud cries and exclamations in the public streets, to the great disturbance of divers citizens; such acts, if an offence at all, constitute a nuisance, and must be alleged to be to the great damage and common nuisance of all the citizens. *Commonwealth v. Smith*, 6 Cush. 80. But, if a count charges a person with "openly and publicly speaking with a loud voice in the hearing of the citizens, &c., wicked, scandalous, and infamous words, representing men and women in obscene and indecent attitudes, with the intention to debase,

distillery, with sties in which large quantities of hogs are kept, the offal from which renders the waters of a creek unwholesome, and the vapors from which render a dwelling uninhabitable, is a nuisance.¹ So it is a nuisance to throw, from day to day, into water used for the ordinary purposes of life, any substance that renders it less pure, and excites disgust in those who use it.² And a soap-boiling establishment in the midst of a densely populated city is a nuisance, against which a perpetual injunction will be issued.³ So, although a stable in a town is not, like a slaughter-pen or a hog-sty, necessarily or *primâ facie* a nuisance, yet, if it be so built, so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value as places of habitation, or if the adjacent proprietors are annoyed by it in any manner which could be avoided, it becomes an actionable nuisance.⁴ So a livery stable, in a city, erected within sixty-five feet of a hotel, is *primâ facie* a nuisance, and may be restrained by injunction. And the answer of the defendant, admitting the facts charged in the bill, as to the distance and relative situation of the stable from the tavern, but denying that a livery stable is a nuisance, is mere matter of opinion, and not sufficient to authorize the dissolution of the injunction, before the final hearing. Nor will the Court discharge the *ad interim* interdict, so far as to permit the experiment to be made, whether a livery stable could be erected and con-

¹ Smith v. M'Conathy, 11 Mis. 517.

² Lewis v. Stein, 16 Ala. 214.

³ Brady v. Weeks, 3 Barb. 157.

⁴ Dargan v. Waddill, 9 Ired. 244.

debauch, and corrupt the morals of the youth and others," without averring that the offence was a common nuisance; it is good, such offence being a misdemeanor at common law; and the precise words and attitudes need not be described. And a person who collects together a large crowd in the public highways and streets of a city, by means of "violent and indecent language addressed to persons passing along the highway," thereby obstructing the free passage of the street, is indictable for committing a common nuisance. *Barker v. The Commonwealth*, 19 Penn. 412.

structed in such a manner as not to be a nuisance.¹ So a powder magazine, erected in a populous part of a city, in which large quantities of gunpowder are stored, is *per se* a nuisance.² So a dwelling-house cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance, and may be abated by individuals residing in the neighborhood, by tearing it down, especially during the prevalence of a disease like the Asiatic cholera.³ So, under a power to do all acts, make all regulations, and pass all ordinances which they shall deem necessary for the preservation of health and the suppression of disease, and to carry into effect and execute the powers granted by the charter, a municipal corporation has power to pass an ordinance, prohibiting the depositing of dead animals, decayed vegetables, &c., in any public street, or upon any lot, &c., and imposing a penalty for the violation of such ordinance.⁴ But a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. And, under the provision of a city charter, authorizing the common council to make and publish ordinances, by-laws, &c., for the purpose of abating and removing nuisances, they have no power to direct the removal of a person, sick of a contagious or infectious disease, from one place to another, without his consent.⁵ And more especially where a vessel was wrecked thirteen miles from Charleston, and the cholera had made its appearance among the passengers, and the city authorities, in order to prevent the spread of the infection, ordered the destruction of the vessel and cargo; it was held a violation of the authority of the corporation,—the nuisance existing beyond their corporate limits; and they were held liable in trespass.⁶ So the occupation of a building in a

¹ Coker v. Birge, 10 Geo. 336.

² Cheatham v. Shearon, 1 Swan. 213.

³ Meeker v. Van Rensselaer, 15 Wend. 397.

⁴ City, &c. v. Collins, 12 Barb. 559.

⁵ Boom v. The City of Utica, 2 Barb.

104.

⁶ Jarvis v. Pinckney, Riley, 123.

city as a *slaughter-house* is *prima facie* a nuisance to persons residing in the neighborhood; and may be restrained by injunction, notwithstanding the denial by the defendant, that it is a nuisance.¹ So a melting-house in a city, for the purpose of trying animal fat from the slaughter-houses, is presumptively a nuisance to the inhabitants in its vicinity; and a general denial that it is a nuisance or offensive will not justify the dissolution of a preliminary injunction.² In all the class of cases above referred to, as will be presently seen, (§ 17,) although obviously *public* nuisances, a court of equity may interpose by injunction. And as will be explained, to entitle parties to such an injunction, it is not necessary that they should reside on the premises affected by the nuisance. It suffices that the nuisance is calculated to diminish the value of their property, by preventing good tenants from occupying it, or by destroying its value for building lots.

7. It has been suggested that erections of every kind, adapted to sports and amusements, having no useful end, and notoriously fitted up and continued for the profit of the owner, are regarded by the common law as nuisances.³ And upon this ground, a *bowling-alley*, kept for *gain or hire*, is held a public nuisance at common law, though gambling be expressly prohibited.⁴ And, under a village charter, authorizing the trustees to pass by-laws relating to nuisances, they have power to make a by-law prohibiting the keeping of bowling-alleys for hire.⁵

8. A nuisance may also consist in the obstruction of a highway, more especially if accompanied with noise and disorder, and tending to the interruption of regular business. A temporary occupation of a part of a street or highway, by persons engaged in building, or in receiving or delivering goods from stores or warehouses or the like, is allowed from

¹ *Brady v. Weeks*, 3 Barb. 157.

² *Peck v. Elder*, 3 Sandf. 126.

³ *Per Cowen, J., Tanner v. The Trustees, &c.* 5 Hill, 121.

⁴ *Ibid.*

⁵ *Ibid.* See *The People v. Sergeant*, 8 Cow. 139; *Hall's case*, 1 Mod. 76.

the necessity of the case; but a systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable.¹ Thus, where the defendants, proprietors of a distillery, in Brooklyn, were in the habit of delivering their grains, remaining after distillation, to those who came for them, by passing them through pipes to the public streets opposite to their distillery, where they were received into casks standing in wagons and carts; and the teams and carriages of the purchasers were accustomed to collect there in great numbers, to receive and take away the article; and, in consequence of their remaining there to await their turns, and of the strife among the drivers for priority, and of their disorderly conduct, the street was obstructed and rendered inconvenient to those passing thereon; held, a nuisance. So, although the teams were not owned by the defendants, or under their control, the defendants having, by the manner of conducting their business, invited those assemblages, at the point where the article was delivered. And proof of strife and collision among the drivers, while awaiting their turns, is competent evidence towards establishing the fact of the obstruction.²

9. Although *noise* may amount to a nuisance, and is also actionable, yet it must be a very special case in which real estate can be injured by a mere noise, so as to sustain an action for the injury.³ But to justify such an action, it is not necessary that the plaintiff should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable; as by the business of finishing steam-boilers, in a compact part of a city, whereby the occupant of an adjoining dwelling is annoyed by the noise and dust.⁴ So a railroad is not *per se* a nuisance, and, although persons residing on the street may be subjected to some inconvenience from the noise and smoke and frequency

¹ The People v. Cunningham, 1 Denio, 524.

² Ibid.

³ Per Hand, J., Trustees, &c. v. Utica, &c. 6 Barb. 313.

⁴ Fish v. Dodge, 4 Denio, 311.

of passing trains, yet it must be a very special and peculiar case in which real estate can be injured by mere noise, or the usual concomitants attending the passage of a railroad train.¹ The fact of nuisance must be determined by a jury.² So, although the noise of a steam-engine, under some circumstances, may become a private nuisance; the use of a steam-engine is not *prima facie* a nuisance, on account of the danger to life from explosion.³ And no action lies, for keeping pointers so near the plaintiff's house, that his family were disturbed and kept awake in the night.⁴

10. A *furious dog*, more especially if accustomed to bite mankind, is a common nuisance, and may be killed by any one. (a) In an action to recover damages for killing such a dog, the defendant need not prove that he was obliged to kill him in self-defence.⁵ And this, whether he is permitted to run at large by his owner, or escapes through negligent

¹ Williams v. New York, &c. 18 Barb. 222.

⁴ Street v. Tugwell, 2 Selw. 1047.

² Bell v. Ohio, &c. 25 Penn. 161.

⁵ Brown v. Carpenter, 26 Verm. 638; Dunlap v. Snyder, 17 Barb. 561.

³ Davidson v. Isham, 1 Stockt. 186.

(a) It has been held, however, that, if a justification be pleaded for the destruction of a dog, it must be shown that at the time he was either in the act of destroying the defendant's property, or that it was absolutely necessary for the preservation of his property. Janson v. Brown, 1 Camp. 41; Wells v. Head, 4 C. & P. 568.

The defendant's merely having put up a notice, that all dogs trespassing on his land would be shot, is not a sufficient justification. Corner v. Champneys, 2 Marsh. 584. But the servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, though not absolutely necessary for the preservation of the deer, and although the dog were not chasing the deer at the moment of shooting; if the chasing and shooting were all one transaction. Protheroe v. Mathews, 5 C. & P. 581.

If the defendant justify shooting the plaintiff's dog, by pleading that he attacked him, and that "he was accustomed to attack and bite mankind;" the plaintiff may offer evidence of the general quietness of the dog. Clark v. Webster, 1 C. & P. 104.

Suffering fierce and dangerous animals, as a fierce bull-dog, which is used to bite people, to go at large, is an indictable offence. 4 Burn's Just. 578.

keeping; the owner having notice of his vicious disposition.¹ And any person is justified in killing a dog, which has been bitten by another mad animal.² So one may kill the dog of another, if he cannot otherwise protect his property from injury by him. Hence where, in trespass for killing the plaintiff's dog, there was evidence tending to show that the dog was vicious, known to be so by the owner, and in the act, at the time he was killed, of doing injury to the defendant's property, in his garden; it was held error to instruct the jury to find for the plaintiff, leaving to them to fix only the amount of damages.³ So the inhabitant of a dwelling-house may lawfully kill the dog of another, where such dog is in the habit of haunting his house, and by barking and howling, by day and by night, disturbs the peace and quiet of his family, if the dog cannot be otherwise prevented from annoying him; although a wanton destruction of the animal is not justifiable.⁴ (a) So,

¹ Putnam v. Paine, 13 Johns. 312.

² Ibid.

³ King v. Kline, 6 Barr, 18.

⁴ Brill v. Flagler, 23 Wend. 354.

(a) It has been held, that, in an action to recover damages for the killing of a dog, the opinion of a witness as to his value is inadmissible, there being no standard market value for such property. After hearing the evidence of the peculiar qualities and properties of the animal, it is for the jury to judge of the value. *Dunlap v. Snyder*, 17 Barb. 561; *contra*, *Brill v. Flagler*, 23 Wend. 354.

If, in such an action, proof of the good qualities of the dog is admitted, the defendant may show, by way of rebuttal, and in mitigation of damages, that the dog was worthless, and in the habit of worrying and killing sheep, although such facts were not set up in the answer. *Ibid*.

An indictment for malicious mischief will lie for killing a dog. But, to support such indictment, it must be shown that the killing was from malice against the master. It is not sufficient that it was the result of passion, excited against the animal, by an injury he had done to the defendant's property. *The State v. Latham*, 18 Ired. 33.

A person may follow a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. *Gundry v. Feltham*, 1 T. R. 334.

although a man may keep a dog for the necessary defence of his house, garden, or fields, and may cautiously use him for that purpose in the night-time; yet, if he permit a mischievous dog to be at large on his premises, and a person is bitten by him in the day-time, the owner is liable in damages, though the person be at the time trespassing on the grounds of the owner, by hunting in his woods without license.¹ And the owner of one animal is liable for injuries done by it to another animal belonging to the plaintiff. Thus a dog, accustomed to attack and bite other dogs without being incited, though not trained to the habit, is a vicious animal, and the owner will be liable for the damage done by him to other dogs lawfully and peaceably on the premises where he is.² Though it is not a rule, that when two dogs fight, and one is killed, the owner of the latter can have satisfaction for his loss from the owner of the other.³ So the owner of a bull is liable to an action, if the bull break from his enclosure and fatally gore a horse of his neighbor.⁴ (a)

11. But, although an injury done by a dog or other animal is generally treated as technically a *nuisance*, yet it is to be observed, that in many cases such an injury, like other wrongs against person or property, is a *trespass*, and the proper subject of an action of trespass, rather than an action

¹ Loomis v. Terry, 17 Wend. 496.

² Wheeler v. Brant, 23 Barb. 324.

³ Wiley v. Slater, 22 Barb. 506.

⁴ Dolph v. Ferris, 7 W. & S. 367.

Because they are *noisome* animals. Nicholas v. Badger, 3 T. R. 259.

Exercising unruly horses, in an improper place, is a nuisance. Michael v. Alestree, 2 Lev. 172.

(a) In an action of trespass under the statute of Pennsylvania, the defendant is liable for injuries done to a flock of sheep by fright, as well as for the sheep killed by the dog. But, if the action be either in trespass under the statute, or in case at common law, the defendant is not liable for damages, unless it be shown that he knew his dog had worried and killed sheep before. And the jury must determine the question of *scienter*. Campbell v. Brown, 19 Penn. 359.

on the case. The distinction upon this subject is made, that, if a person cause an injury with his dog, the remedy is trespass; but, if the dog do an injury of his own accord, in the absence of his owner, the remedy is case.¹ This, however, is not the limit of the liability as for a trespass. Thus trespass is held to lie against the owner of a dog which has worried and killed the plaintiff's sheep, although the owner were not present.² And the broad distinction upon the subject is no doubt accurately stated by an approved writer, as follows: "The owner of domestic and other animals not necessarily inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to the person or personal property, unless it can be shown that he previously had notice of the animals' vicious propensity, or that the injury was attributable to some other neglect on his part; it being in general necessary in an action for an injury committed by such animals to allege and prove the *scienter*; and though notice can be proved, yet the action must be *case*, and not *trespass*. But if the owner himself acted illegally, he may be liable, even as a trespasser, as where a person in company with his dog trespassed in a close through which there was no footpath, and the dog, without his concurrence, killed the plaintiff's deer; and if a person let loose or permit a dangerous animal to go at large, and mischief ensue, he is liable as a trespasser, the law in such cases presuming notice to the defendant of the mischievous propensity of such animal. And with respect to animals *mansuetæ naturæ*, as cows and sheep, as their propensity to rove is notorious, the owner is bound at all events to confine them on his own land, and if they escape and commit a trespass on the land of another, unless through the defect of fences which the latter ought to repair, the owner is liable to an action of trespass, though he had no notice, in fact, of such propensity. But for damage by animals, &c., *feræ naturæ* escaping from

¹ *Dilts v. Kinney*, 3 Green, 130.

² *Paff v. Slack*, 7 Barr, 254; *Campbell v. Brown*, 19 Penn. 359.

the land of one person to that of another, as by rabbits, pigeons, &c., no action can be supported, because the instant they escaped from the land of the owner, his property in them was determined. And a person cannot be liable for the act of cattle, unless he were the general owner, or he actually put them into the place where the injury was committed; and if a servant or a stranger, without the concurrence of the owner, chase or put his cattle into another's land, such owner is not liable, but the action must be against the servant or stranger."¹ And, in a very late case in Pennsylvania, it is said, "the law seems to be settled, that the owner of beasts prone to commit trespasses is liable for injuries resulting from such propensity, such as breaking into enclosures, and consuming and destroying grain, grass, herbage, &c."² So where a bull broke into an enclosure and gored a horse, that he died.³ So, too, in case of a horse permitted to run in the streets of a city, which, in its gambols, kicked and injured a person;⁴ *and that the remedy is in trespass.* The property in the animal raises the duty, on the part of the owner, to guard against its mischievous propensities, and failing in this, it holds him answerable for its injurious acts, without regard to the degree of care bestowed in controlling it. *Sic utere tuo ut non alienum lædas* applies to all such cases. *It is not a question of negligence or want of due care on the part of the owner."*⁵ (a)

¹ 1 Chit. Pl. 71.

² 3 Bl. Com. 211; Bac. Abr. Title Trespass, G. 2.

³ Dolph v. Ferris, 7 W. & S. 369.

⁴ Goodman v. Gay, 3 Harris, 194.

⁵ Per Thompson, J., Russell v. Cotton, Am. Law Reg. May, 1859, p. 406.

(a) We have already considered (chap. 9) the rights and remedies of the owner of animals, in case of their being *distained* or *impounded*. It may be further remarked in the present connection, that the frequent cases of injuries done by animals upon or near the highway, or in consequence of defective fences, are also usually treated as *trespasses* and the subjects of an action of trespass, and not an action on the case. It is the ancient doctrine, as stated in the text, (p. 83,) that a party is not liable for any injury done on the lands of another by animals *feræ naturæ*, over which he has no

12. It is held, that the owner of a domestic animal is not liable for the injuries which it may have committed, unless

control; such as rabbits which escape from his lands. *Boulston's case*, 5 Co. 104 b.

But it is now held, that at common law every unwarrantable entry by a person or his cattle upon the land of another is a trespass, though the cattle come from the highway, and the land be unfenced; and though the owner exercised care and prudence to keep them in his own enclosure. Otherwise, it is said, if cattle driven along a highway escape into an adjoining field, against the owner's will. More especially in the absence of any public regulation as to fences, or as to cattle's running at large. *The Tonawanda, &c. v. Munger*, 5 Denio, 255; *Wells v. Howett*, 19 Johns. 385; *contra*, *Cleveland, &c. v. Elliott*, 4 Ohio, (N. S.) 474.

So it is not a trespass, for cattle used by a person in making a road, to stray upon adjoining unfenced land, against the will of their owner. Nor where they are necessarily driven upon adjoining land. *Cool v. Crommet*, 1 Shep. 250.

But the owner of a cow, accustomed to hook, the vicious propensity being known to him, is liable for damage done by her, although it be done in the highway, against his land, and while going to her usual watering-place. *Cogswell v. Baldwin*, 15 Verm. 404.

And trespass is held to lie for the entry of cattle on land, though the owner had no notice of their mischievous propensity. *Page v. Hollingsworth*, 7 Ind. 317.

In an action of trespass *quare clausum* for damages done by the defendant's sheep, a town by-law, authorizing cattle and sheep to run at large upon the highways and common lands of the town, even if such a by-law were a sufficient authority for the defendant to allow his sheep to run at large on the highways, furnishes no excuse for suffering them to break through the plaintiff's fence and depasture his meadow. And, in an action for such an injury, and for that alone, the giving of the by-law in evidence, unaccompanied by any other proof, will not constitute a defence. *White v. Scott*, 4 Barb. 56.

Where A.'s sheep escaped from his land into B.'s land, through the insufficiency of a fence which B. was bound to repair, and thence passed into another adjoining lot of B., which was surrounded by a sufficient fence, and committed damage; it was held, that B. could not maintain trespass therefor against A. *Page v. Olcott*, 13 N. H. 399.

He who has the care and custody of sheep, for the purpose of depasturing them, is liable for damage done by them, in the same manner and to the same extent as the owner. *Barnum v. Vandusen*, 16 Conn. 200.

he had notice of its vicious propensity, or that it was accustomed to do mischief.¹ And the question of *scienter* is for

¹ *Vrooman v. Sawyer*, 13 Johns. 339; *Lyke v. Van Leuren*, 4 Denio, 127; 1 Comst. 515.

And, on the other hand, upon a full examination of the somewhat contradictory authorities, it has been very recently decided, in Pennsylvania, that the owner of cattle is not liable in trespass—and it is doubted whether he would be liable in case—for any injury to land committed by them while in the custody of an *agister*. *Rossell v. Cottom*, Am. Law Reg., May, 1859, p. 405.

One cannot justify the killing of his neighbor's stock, under the Missouri "inclosure" act, (Revised Statutes, 1845,) without showing himself exactly within its protection. *Early v. Fleming*, 16 Mis. 154.

In an action of trover for a ram, the defence was, that it was taken going at large, contrary to the statute, and that the defendant selected this ram, claiming him to be forfeited. To prove the fact of the selection, the defendant relied upon evidence introduced by the plaintiff, showing that the defendant secretly removed the ram in question several miles off, and that he afterwards brought him back in the night, and kept him awhile privately confined in his barn, in his cellar, and in his office, and then killed him. Held, that these acts did not conduce to show a selection of this ram, or an intention of selecting him, from others, as the subject of the forfeiture. *Watson v. Watson*, 14 Conn. 188.

In an action for trespass by cattle, it is a *matter of defence*, and to be shown by the defendant, that the fence which the plaintiff was bound to keep in repair was defective. *Colden v. Eldred*, 15 Johns. 220.

Where beasts, *damage feasant*, have been distrained or even impounded, the distrainer may relinquish the proceedings by distress, before satisfaction for the damage, and bring an action of trespass. *Ibid*.

A., the owner of a field, leased eight acres of it to B., the whole being under a common enclosure, without any division fence. A. turned his stock upon the ground possessed by himself, and they went thence to the land occupied by B., and consumed his crop. Held, that A., having leased the land to B., had no right to prevent him from reaping the full benefit thereof, and that the removal of the enclosure, so as to let in his stock, was an actionable injury. Also, that trespass *vi et armis* was the appropriate and only remedy. Also, that B. was not bound to erect a division fence, nor to aver in his declaration that A. was bound to do so. *Henly v. Neal*, 2 Humph. 551.

A person finding horses trespassing on his land may turn them into the
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the jury.¹ Hence in an old case it was decided, that a declaration, in an action on the case for an injury done by the defendant's dog, must state, that he knew that the dog was of a mischievous nature, or had done mischief before. The allegation, that the dog was a mongrel mastiff, *very fierce*, and not muzzled, and that he *furiously and violently attacked, and grievously bit and wounded* the plaintiff, &c., is not sufficient.² So a declaration, that a fox-hound belonging to the defendant went into the plaintiff's field, and worried his sheep, but not averring that the dog was of vicious propensities, known to the defendant, and that he negligently allowed it to be at large, (see § 13,) is insufficient. Blame can only attach to the owner of a dog, when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits.³ And the same rule applies, where the defendant's swine tore and fatally injured a cow with a calf newly brought forth; though the swine were trespassing upon the plaintiff's land, when they committed the injury:⁴ unless the declaration is for breaking and entering the close, and the killing of the ani-

¹ Campbell v. Brown, 19 Penn. 359. ³ Fleeming v. Orr, 29 Eng. L. & Eq. 16.

² Mason v. Keeling, 12 Mod. 332.

⁴ Lyke v. Van Leuren, 4 Denio, 127.

highway, and is not liable, though they may be lost in consequence. Humphrey v. Douglass, 10 Verm. 71.

So, though they escape from the enclosures of the owner, through the insufficiency of a division fence, which it was his duty in common with another to maintain, the latter may lawfully turn them from his enclosure into the highway. Humphrey v. Douglass, 11 Verm. 22.

The defendant, A., by virtue of the charter of a turnpike company, had the right to enter the enclosed field of B., the plaintiff, for the purpose of procuring materials to construct such turnpike; and, in so doing, left down the fences of the plaintiff, whereby cattle entered and destroyed his crop. Held, A. was liable, although the plaintiff's fence was not as high in other places as was required by statute. Crawford v. Maxwell, 3 Humph. 476.

mal alleged in aggravation; in which case the defendant would be liable.¹ So an action on the case will not lie for keeping a mad bull, without saying *scienter*.² And a father is not liable, for injury occasioned by his minor daughter's wilfully setting his dog upon a neighbor's swine, without proof that he knew that his dog was accustomed to do mischief.³ But, in an action for trespass in killing a dog, where the defence was, that the dog was ferocious and in the habit of attacking individuals, it was held not necessary to prove a *scienter* as to the plaintiff, to support the defence.⁴ So the owner of a horse, who suffers it to go at large in the streets of a populous city, is answerable for an injury done by it to any person, without proof that the owner knew that the horse was vicious.⁵

13. One who knowingly keeps an animal, accustomed to attack and bite mankind, is *prima facie* liable in an action on the case to any person attacked and injured by such animal, without any averment of negligence or default in securing or taking care of it, (see p. 86). The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. And an allegation of duty in the defendant, to use due and reasonable care and precaution in keeping the animal, is an immaterial allegation.⁶ So it is doubted whether it would be a defence, even that the injury was occasioned solely by the wilfulness of the plaintiff, after warning.⁷ And it has been held, that an action on the case lies for knowingly keeping a dog used to bite, though the damage happened by accidentally treading on him.⁸ So where the owner of a dog, which had bitten other persons, had notice of the fact, and afterwards suffered him to be at large, when he bit the plaintiff; it was held, that evidence was not admissible that the dog was generally inoffensive.⁹

¹ Van Leuren v. Van Lyke, 1 Comst. 515.

² Buxentine v. Sharp, 3 Salk. 12.

³ Tift v. Tift, 4 Denio, 175.

⁴ Maxwell v. Palmerton, 21 Wend. 407.

⁵ Goodman v. Gay, 15 Penn. 188.

⁶ Card v. Case, 5 Com. B. 622.

⁷ May v. Burdett, 9 Ad. & Ell. N. S.

101; Popplewell v. Pierce, 10 Cush.

509.

⁸ Smith v. Pelah, 2 Stra. 1264.

⁹ Buckley v. Leonard, 4 Denio, 500.

14. In an action for an injury alleged to be done by a ferocious and mischievous dog of the defendant, known by him to be of that character, the plea of not guilty puts the *scienter* in issue, as well as the character of the dog.¹ Proof that the dog is of a furious disposition, and has bitten cattle, is no evidence of the *scienter*; but a promise by the owner, on being informed of the injury, to make compensation, is some, though very slight evidence of it.²

15. With regard to the proper *parties* in the action for a nuisance, it has been held in the State of New York, where the subject is regulated by express statute, that, in the common law action by *writ of nuisance*, as retained and regulated by the Revised Statutes, it seems the declaration must show, that the plaintiff has a freehold estate in the premises affected by the nuisance, this being a real action. But, in an action on the case for damages, it is enough that the plaintiff is in *possession*. And, where the plaintiff commenced his action by writ of nuisance pursuant to the statute, and the formal commencement of the declaration was appropriate to that action, and referred to the writ; but the declaration contained no averment that the plaintiff had a freehold estate, but showed a good cause of action on the case, and concluded thus, "to the nuisance of said dwelling-house and premises of the plaintiff and to his damage five thousand dollars;" held a good declaration in an action on the case, although it showed no ground of recovery in the action of nuisance proper.³ (a) But it is also held in the same State,

¹ Thomas v. Morgan, 1 Gale, 172;
Card v. Case, 5 Com. B. 622.

² 1 Gale, 172.
³ Cornes v. Harris, 1 Comst. 223.

(a) A. conveyed a lot of land to B., who at the same time mortgaged it back. B. quitclaimed to C., who made a sealed lease to D. and E., and their assigns, of the right and privilege of digging a well in the land, and of conducting water therefrom to their houses. About the same time, A., after entry for foreclosure, but before foreclosing his mortgage, undertook to confirm the lease by an instrument under seal, but not acknowledged, and afterwards quitclaimed the land to C. and F., with a covenant against all claiming

that, under the statute which abolishes the writ of nuisance, but enacts that such injuries shall be the subject of an action, like other injuries, in such actions, the plaintiff must aver all that was before requisite to sustain an action of that nature; that he is tenant of the freehold injured, and that the defendant was tenant of the freehold of the land whereon the nuisance was erected.¹ (a) With regard to the party liable for a nuisance, it is held, that one who demises premises, for carrying on a business necessarily injurious to the adjacent proprietors, is liable as the author of the nuisance.² And a distinction has been suggested in the State of New York, between the writ of nuisance and the modern action on the case for damages, similar to that already mentioned in relation to the plaintiff in the suit. It is there held, that the writ of nuisance is an obsolete proceeding, not to be encouraged; and the Court will not, therefore, in such a proceeding, relax the strictness of the ancient practice.³ Hence the

¹ *Ellsworth v. Putnam*, 16 Barb. 565.

² *Fish v. Dodge*, 4 Denio, 311. See *Brady v. Weeks*, 3 Barb. 157.

³ *Kintz v. McNeal*, 1 Denio, 436.

under him or his heirs. C. afterwards conveyed all his interest in the land to D., who had meanwhile also become the owner of E.'s house. Held, D. had sufficient title in the well, to enable him to maintain an action on the case, for a corruption of the water therein by means of a cesspool sunk in the ground near by, no plea in abatement having been filed to the non-joinder of E. or of F., and that it was immaterial whether B. had released his equity of redemption to A. before A. confirmed the lease. *Call v. Buttrick*, 4 Cush. 345.

(a) It has been made a question, whether the alienee of a house can maintain an action for continuance of a nuisance, without notice to remove it. *Penruddock's case*, 5 Co. 101 a; *Cotterell v. Griffiths*, 4 Esp. C. 69; *Chandler v. Thompson*, 3 Camp. 82; *Willes*, 583; *Jenk.* 260, pl. 57.

A devisee can maintain an action for the continuance of a nuisance erected in the lifetime of the testator. *Some v. Barwish*, Cro. Jac. 231.

A reversioner may sue, where his reversionary interest is injured. *Jackson v. Pesked*, 1 M. & S. 234; *Biddlesford v. Onslow*, 3 Lev. 209. As by tending to alter the evidence of title. *Alston v. Scales*, 9 Bing. 3.

writ of nuisance must be brought against the party by whom the nuisance was erected; or, if he has transferred the land to another, then against both of these parties. But an action of nuisance against the alienee alone, for keeping up and continuing a nuisance erected by his grantor, was unknown to the common law, and is not authorized by the Revised Statutes.¹ (a)

16. But, in general, every injury caused by the continuance of a nuisance is in law a new nuisance, and affords a new and distinct ground of action. Thus a purchaser may maintain an action for the continuance of a nuisance erected before his purchase, and an heir for the continuance of one erected in the time of his ancestor.² And this principle more especially applies, where the plaintiff derives his title from the defendant who created the nuisance before, but continues it after, the transfer to the plaintiff. Thus the defendant had, more than twenty years before the action, constructed a sewer or watercourse through property of his own, and then occupied by him. In 1845, the defendant let a house, shop, and cellar to the plaintiff, which the defendant down to that time also occupied with the property. In 1851, the sewer or watercourse burst, and thereby the plaintiff's cellar and goods were damaged; and the plaintiff thereupon brought an action against the defendant for negligently and improperly making and

¹ Brown v. Wordworth, 5 Barb. 550. der, 1 Denio, 257; Brady v. Weeks,

² Per Beardsley, J., Vedder v. Ved. 3 Barb. 157.

(a) An infant only a year or two old, upon whose lands a nuisance is erected, cannot be made criminally answerable for it. Nor a *feme covert*, upon whose lands her husband erects a nuisance. To maintain such indictment, it is not enough merely to show ownership of the lands on which the nuisance exists; but it must appear that the defendant either erected or continued it, or in some way sanctioned its erection or continuance. And where, on the trial of an indictment for a nuisance upon the defendants' land, they admitted the title in fee to be in a third person, as trustee for them, and that they were *cestuis que trust*, &c.; held, not an admission of their being owners of the land, or that they had any estate in it. The People v. Townsend, 9 Hill, 479.

constructing the sewer, and keeping and continuing the same negligently and improperly made and constructed, and so causing the damage. The jury found that the sewer was not originally constructed with proper care, and it was proved that it had been continued in the same state. Held, upon the letting of the premises to the plaintiff, a duty arose, on the part of the defendant, to take care that that which was before rightful did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff; and, upon this ground, as also upon the principle *sic utere tuo ut alienum non lædas*, the action was maintainable.¹ So, if one erect a nuisance on his own land, to the injury of the land of another, and then convey the premises to a purchaser with warranty; he nevertheless remains liable in an action for the subsequent continuance of the nuisance.² And this consideration of course affects the amount of damages in such action. The rule of damages is the injury actually sustained at the commencement of the suit; and a party cannot recover in this action, for permanent or prospective injury.³ (a) Thus, in an action by a reversioner, for damages done to the reversion by cutting off the eaves of a building belonging to him, and by erecting a wall with a drip over his premises; as there may be repeated actions for continuing the nuisance, evidence of a diminution in the saleable value of the premises is not admissible.⁴ And an action lies for the continuance of a nuisance, though the plaintiff have accepted money paid into

¹ *Alston v. Grant*, 24 Eng. L. & Eq. 122.

² *Thayer v. Brooks*, 17 Ohio, 489.

³ *Waggoner v. Jermaine*, 3 Denio, 306.

⁴ *Bathishill v. Reed*, 37 Eng. L. & Eq. 317.

(a) Evidence cannot be given of injuries other than those alleged. *Smith v. McConathy*, 11 Mis. 517.

The gist of the action in nuisance is the damage, and therefore evidence may be given of consequential damages; not so in trespass, which is one entire act. *Case of Farmers of Hempstead Water*, 12 Mod. 519.

court in full satisfaction of the original erection.¹ So parties who cause a nuisance, by acts done on the land of a stranger, are liable for its continuance; notwithstanding the defence, that they cannot lawfully enter, to abate the nuisance, without rendering themselves liable to an action by the owner of the land.² So the rule applies as against a mere *lessee*. Thus, where the plaintiff had recovered from a tenant for years, who afterwards underlet the premises on which the nuisance was erected to a sub-tenant, and an action for the continuance of the nuisance was brought against the former tenant; it was held, that the action was maintainable, for the defendant had transferred the premises with the original wrong, and by his demise had affirmed the continuance of it.³ So, where a tenant for years erects a nuisance, for which damages are recovered, and assigns the term, and the nuisance is continued; an action will lie either against the tenant for years, or his assignee. But there shall be only one satisfaction.⁴ The qualification, however, is usually annexed to the liability in question, that a person, who continues a nuisance erected by another, is liable therefor at the suit of any party damaged thereby, *if notified to remove it*. But, it is held, the absence of proof of a request to discontinue it must be objected to specifically at the trial, or it will not be available on appeal.⁵

17. Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance; as in case of nuisance to a neighboring trade or tenement.⁶ But it is not every case of nuisance which will authorize the exercise of the jurisdiction. It rests upon the principle of a clear and undoubted right to the enjoyment of the subject in question, and will only be exercised in a case of strong and imperious necessity, or where the rights of the party have been

¹ Holmes v. Wilson, 10 Ad. & Ell. 503.

² Smith v. Elliott, 9 Barr. 345.

³ Rosewell v. Prior, Salk. 460.

⁴ Ibid. 12 Mod. 635.

⁵ Brown v. Cayuga, &c. 2 Kern. 486; Snow v. Cowles, 6 Post. 275.

⁶ Gilbert v. Mickel, 4 Sandf. Ch. 357; Norris v. Hill, 1 Mann. 202.

established at law.¹ This jurisdiction is said to be of recent origin, and always exercised sparingly and with great caution.² (a)

¹ *Fisk v. Wilber*, 7 Barb. 395.

² *Simpson v. Justice*, 8 Ired. Eq. 115.

(a) Where a party does not take an injunction in the first instance, but permits the other party to go on erecting the building and fixtures from which a nuisance is anticipated, if, at the hearing, he prays for a perpetual injunction, he must do so on the ground, that, in the mean time, the fact of nuisance has been established by an action at law, or, at all events, he must support his application by strong and unanswerable proof of nuisance. *Simpson v. Justice*, 8 Ired. Eq. 115.

A plaintiff complained of works intended to be executed by the defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance. Much negotiation took place, in the course of which the defendants showed a continued acquiescence in the suggestions made by the plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the defendants, in order to avoid litigation, passed a resolution at a vestry, at which the plaintiff was present, that the work should be wholly abandoned. After that, the plaintiff brought on his motion. Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused, with costs. *Woodman v. Robinson*, 15 Eng. Law & Eq. 146.

Where the defendant, as mayor of New York, and head of its police, after many complaints made to him against the complainant's establishment, as being a mock auction store, under the statute making it the duty of such police to caution strangers against mock auctioneers, caused a placard to be displayed in front of the defendant's store, as follows, "Strangers, beware of mock auctions;" held, a proper case for the granting of an injunction, although the placard might be libellous; but, as the defendant had acted *bonâ fide*, and was in the proper discharge of his duty, the complainant must be left to his remedy by law. *Gilbert v. Mickle*, 4 Sandf. Ch. 357.

Judge Story remarks: "The interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. It is not every case which will furnish a right of action against a party for a nuisance, which will justify the inter-

18. The law not only allows an action for damages in case of nuisance, but also provides the remedy of *abatement* or compulsory discontinuance of the nuisance itself. A public nuisance may be abated by any one; a private nuisance, by any one whose property is injured; and entry for such purpose is justifiable:¹ though a nuisance cannot be abated by a judgment in an action on the case; there must, for that purpose, be either an assize or a *quod permittat*.² And an action on the case for a nuisance is not abated or barred by a subsequent abatement of the nuisance by the plaintiff.³ (a) With regard, however, to the extent and limitations

¹ Lancaster, &c. v. Rogers, 2 Barr, 114. ² Kendrick v. Bartland, 2 Mod. 253.

³ Call v. Buttrick, 4 Cush. 345.

position of courts of equity to redress the injury, or to remove the annoyance. But there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly-recurring grievance, which cannot be otherwise prevented, but by an injunction." Such are cases of loss of health, trade, or means of subsistence, or permanent ruin of property; darkening windows; obstructing watercourses; abuse of the powers of a corporation; interference with a ferry. 2 Story's Eq. 238, §§ 925-927.

And in a late case, where property was appropriated to public use under a corporate charter alleged to be invalid, it is said, "The injury complained of, as impending over his property, is its permanent occupation and appropriation to a continuing public use, which requires the divestiture of his whole right, its transfer to the company in full property, and his inheritance to be destroyed as effectively as if he had never been its proprietor. No damages can restore him to his former condition; its value to him is not money, which money can replace; nor can there be any specific compensation or equivalent; his objects in making his establishment were not profit, but repose, seclusion, and a resting-place for himself and family." *Bona parte v. Camden*, &c. 1 Baldw. 231.

(a) In an action for a nuisance, if it be laid as continuing after it has been abated, yet the plaintiff shall recover damages for the injury he sustained previous to the abatement. *Kendrick v. Bartland*, 2 Mod. 253.

Under a provision in the charter of a municipal corporation, authorizing it to pass and enact by-laws and ordinances, to *abate and remove* nuisances,

of the right in question, it is said: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the party who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omissions, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy, as not to allow time to call on the person on whose property the mischief has arisen, to remedy it; in such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice."¹ So it is held, that so much only of the thing as causes the nuisance should be removed. Thus, if a house be built too high, only so much of it as is too high should be pulled down.² And, in gen-

¹ Per Best, J., *Lonsdale v. Nelson*, 2 B. & C. 311.

² *Baten's case*, 9 Co. 53; *Trahern's case*, Godb. 233. See *DuBost v. Beresford*, 2 Camp. 511.

it has no power to pass an ordinance to *prevent* nuisances, or to impose penalties for the creation thereof. *City, &c. v. Collins*, 12 Barb. 559.

The acts of a board of health of a city, in directing the abatement of nuisances, cannot be shown by parol evidence, but only by written minutes of the proceedings or written orders of the board. *Meeker v. Van Rensselaer*, 15 Wend. 397.

Keeping a nuisance is a criminal offence at common law, as well as by the Indiana statute. But an action of debt does not lie for keeping a nuisance within a city, in favor of such city. *Indianapolis v. Blythe*, 2 Cart. 75.

The right of abating or indicting a public nuisance is not affected by a statute imposing a penalty for the offence, unless negative words are added, evincing an intent to exclude common-law remedies. *Rennick v. Morris*, 7 Hill, 575.

eral, where it is the wrongful use of a building that constitutes a nuisance, the remedy is to stop such use, not tear down or demolish the building.¹ So, although *public nuisances* may be abated by the mere act of individuals;² yet it is held that a citizen has no right to abate a public nuisance, if such abatement involve a breach of the peace.³ And, with regard to the kind of nuisance subject to abatement; it is doubted whether an individual has the right, upon his own mere motion, to abate as a nuisance a few loads of ashes laid in the vicinity of his dwelling.⁴ But a statute, authorizing commissioners of highways to order the removal of fences, by the erection of which the highway has been encroached upon, does not abrogate the common-law remedy of abatement of nuisances by the mere act of individuals, or abolish the proceeding by indictment; but is merely cumulative, and seemingly intended to provide a remedy in doubtful or questionable cases.⁵ (a)

¹ *Barclay v. Commonwealth*, 25 Penn. 503.

² *Wetmore v. Tracy*, 14 Wend. 250.

³ *Day v. Day*, 4 Md. 262.

⁴ *Rogers v. Rogers*, 14 Wend. 131.

⁵ *Wetmore v. Tracy*, 14 Wend. 250.

(a) A very noted and important case relating to this subject recently arose in Massachusetts; the decision of which has not yet been authentically reported, but is doubtless stated with substantial correctness in the following newspaper abstract:—

John Brown v. Stephen Perkins and Wife.—This was an action for breaking and entering the plaintiff's shop and destroying various articles of property. The defendants insist that it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and was so declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the evidence shows that it was done.

2d. That the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for that purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

The Court are of opinion that spirituous liquors are not of themselves a common nuisance, but the act of keeping them for sale by statute creates

19. It has been questioned whether any length of time

them a nuisance, and the only mode in which they can be lawfully destroyed is the one prescribed by law—by warrant, bringing them before a magistrate and giving the owner of the property an opportunity to defend his right to it. Therefore, it is not lawful for any person to destroy them by any abatement of a common nuisance, consequently not to use force for that purpose.

2d. That it is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though it may have been sometimes stated in terms so general as to give countenance to this supposition; that this right and power is never entrusted to individuals in general without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3d. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which direct that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offence. And it is clear that, under the statute, spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4th. The true theory of abatement of a nuisance, is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in case of the obstruction across a highway, and an unauthorized bridge across a navigable water, which he was accustomed to use, he may remove it, by way of abatement. But this would not justify strangers being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same.

Some of the earlier cases, in laying down the general proposition that private subjects may abate a common nuisance, did not perhaps remark this distinction; but we think, upon the authority of modern laws, where the distinctions are here accurately made, and upon principle, this is the true rule of law.

5th. That as it is the use of a building, or of keeping spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use.

6th. That the keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the

will enable a party to prescribe for a nuisance.¹ (a) Thus damages may be recovered for any injuries caused within

¹ *Lewis v. Stein*, 16 Ala. 214.

husbands, wives, and children of any persons do frequent such a place and get intoxicating liquors there, does not make it a special nuisance or injury to their private rights so as to authorize and justify such person in breaking the shop where it is thus sold and destroying the liquor therein found and the vessels in which it may be kept. But it can only be prevented as a public or common nuisance in the mode prescribed by law.

(a) No grant, license, or authority to erect or continue a nuisance can be presumed from length of time, in opposition to repeated intermediate expressions of the legislative will, prohibiting its erection. *Lewis v. Stein*, 16 Ala. 214.

A party cannot defend an indictment for nuisance, by showing its continued existence for such a length of time as would establish a prescription against individuals. *The People v. Cunningham*, 1 Denio, 524.

It has been ruled, that one cannot be indicted for continuing a noxious trade which has been carried on in the same place for nearly fifty years. *Neville's case*, Peake, 93.

But a distinction has been made in this respect between an indictment and an action. 1 Russ. (by Grea.) 320.

And it has been held, that, though twenty years' user may bind the right of an individual, the public are not thus barred. *Weld v. Hornby*, 7 E. 199; 3 Camp. 227.

Even though such user be an ancient custom of a town; as, to place a wood-stack in the street before a house, leaving sufficient room for passengers. *Fowler v. Sanders*, Cro. Jac. 446.

But, upon an indictment for obstructing a highway with bags of clothes, it appearing that the place had been used as a market for clothes for over twenty years, and that these bags were put there for sale; Lord Ellenborough said, that, as it appeared to all the world that there was such a market, he could not hold one to be criminal, who came there under the belief that it was a legal fair. *Smith's case*, 4 Esp. 111.

In a late case, in Massachusetts, being an indictment for carrying on an offensive trade, after the making of roads and erection of buildings in the immediate neighborhood; the following remarks were made in reference to the attempted defence of prescription:—

"It derives more countenance from a case in which it is reported to have been said by Abbott, C. J., that if a noxious trade be already established in a place remote from habitations and public roads, and persons afterwards come and build houses, and a public road is made near to it, the trade,

six years, by an erection which amounts to a nuisance, although such erection may have been maintained more

though otherwise a nuisance, may be continued with impunity, because it was legal at its commencement. *Rex v. Cross*, 2 Car. & P. 484.

"If the opinion was in fact ever expressed by the chief justice, it was a mere *obiter dictum*; it could not have been a deliberately formed opinion, for nothing of that kind was requisite to the decision of the question before the Court. But with whatever degree of confidence such an opinion may have been expressed, it seems to be very clear that, upon well-settled principles, it cannot be maintained. No person can lawfully exercise an absolute dominion over the land of which he is the owner. His use and enjoyment of it must have reference to the rights of others, and be subordinate to general laws, which are established for the benefit of all. Under the limitations to which he is thus subjected, it is certainly doubtful whether a proprietor can be justified in making such an appropriation of his estate as will debar others, or the public at large, from the lawful and proper enjoyment of contiguous territory. Without, however, relying upon this consideration, there are other conclusive objections to the proposition asserted as the ground of defence.

"In the first place, the defendant did nothing to acquire the peculiar right upon which he insists. The right acquired by prescription must be by means of adverse and exclusive enjoyment. When the defendant erected his slaughter-house, and commenced the prosecution of his business, he did not interfere with any one, or cause inconvenience either to individuals or the public at large. His acts were therefore strictly legal; because, in the then condition of things, his business could have no tendency to affect the health of the community, or to render the enjoyment of life and property uncomfortable. There was no adverse occupation or possession, to be defended by him or resisted by others. He could therefore gain nothing by prescription.

"But even if the prosecution and continuance of his business for more than twenty years could be regarded as the assertion and maintenance of a claim adverse to the law and the public right, it could be so considered only upon the ground that it was, during all that time, a nuisance subject to be suppressed and abated, and of this he could not avail himself in defence of the present indictment. No length of time will legitimate a nuisance. Easements may be created in lands, and the rights of individuals may be wholly changed by adverse use and enjoyment; but lapse of time does not equally affect the rights of the State." *Per Merrick, J., Commonwealth v. Upton*, 6 Gray, 475.

On a bill by an individual, complaining of injury to his property and

than six but less than twenty years.¹ So, to an action for a noisy nuisance near the plaintiff's dwelling-house, which he was possessed of for a term of years, the defendants pleaded that they had been possessed of certain workshops, in which the noise was made, ten years before the plaintiff was possessed of the term in his house, and that they had always during that time made the noise in question, which was necessary for carrying on their trade. Held, a bad plea.² So, in an action for annoying the plaintiff in the enjoyment of his house, by causing offensive smells to arise near, in, and about it; enjoyment as of right for twenty years was pleaded of a *mixen* on the defendant's land, contiguous and near the house, whereby, during all that time, offensive smells necessarily arose therefrom. On a traverse of the right, the defendant prevailed, but judgment was rendered for the plaintiff *non obstante*, &c., because the plea did not show a right to cause offensive smells in the plaintiff's premises, nor that any smells had really been used to pass beyond the defendant's own land.³ So a soap factory, in the compact part of a city, where it had been carried on for a long period, was held to be a nuisance and restrained by injunction; upon the ground, that such trade, though long established, must give way and recede with the advance of the population.⁴ But, on the trial of an indictment for establishing a noxious trade, near certain dwellings, &c., the defendant was allowed to prove, in bar of the prosecution, under the general issue, that the dwell-

¹ Delaware, &c. v. Wright, 1 New Jersey, 469.

² Flight v. Thomas, 10 Ad. & Ell. 590.

³ Elliotson v. Feltham, 2 Bing. N. R. 134.

⁴ Howard v. Leo, 3 Sandf. 281.

the health of himself and family, by chemical works on lands adjoining the lands on which he resides, and which he alleges to be a nuisance, an injunction should not be allowed, unless a clear case of nuisance and irreparable injury be made out; nor if the complainant has resided three years and a half in the place, after the works have been in operation, before filing his bill. Tichenor v. Wilson, 4 Halst. Ch. 197.

ing-house, in the vicinity of the place &c., was built after the establishment of the alleged nuisance.¹ (a)

¹ *Ellis v. State*, 7 Blackf. 534.

(a) In case of indictment, where the business complained of has been long carried on, but in a less annoying manner or extent; it has been sometimes held, even admitting the general validity of a prescriptive right, that the defendant cannot avail himself of this defence; more especially if he has not adopted improvements in the mode of conducting the business, which would render it less annoying. *Watt's case*, Moo. & M. 281.

Thus, where the defendant set up the business of a melter of tallow in the neighborhood of other manufactories, which emitted disagreeable and noxious smells, it was held that he was not indictable, unless the annoyance was thereby much increased. *Nevill's case*, Peake, 91.

The language, upon this subject, of the learned English judge already referred to, (p. 98, n.) is as follows: "If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near it, that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases the party is entitled to continue his trade." Per *Abbott, C. J.*, *Cross's case*, 2 C. & P. 483.

CHAPTER XII.

NUISANCE.—WATERCOURSE, ETC.

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| 1. Injury to a watercourse, &c.—
whether a nuisance or a trespass.
2. Nature of the title.
3. What constitutes a watercourse.
4. Mutual and relative rights and
liabilities of owners upon a watercourse.
5. Subterraneous streams.
6. Lawful use of the water; priority
of use. | 7. Nature and amount of injury.
9. Lawful uses of water—irrigation,
&c.
10. Statutory authority.
11. Right to erect dams.
16. Flowage.
20. Ancient rights—prescription.
22. Abandonment or non-user.
23. Remedies. |
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1. Having considered the injury termed *Nuisance*, generally, we now proceed to a consideration of those special violations of the right of property, which, according to the established, technical rules of law, appropriately fall under this head. It has been already suggested, (p. 66,) that an injury to any *incorporeal* right is a nuisance, not a trespass; the subject of an action on the case, not of an action of trespass. And this rule is not modified by the further inquiry, which is the turning point in cases of corporeal property, whether such right is *directly* or *consequently* invaded. Thus a right of way is an incorporeal right, and therefore the obstruction of a way, though a direct or immediate injury, is a nuisance, not a trespass; while, on the other hand, a right to ancient lights being also incorporeal, an obstruction of such lights, though caused by an erection upon the land of the party liable for the obstruction, is also a nuisance. (a) And, in regard to incorporeal rights, not per-

(a) It seems, one in the actual use of tangible property may maintain *trespass* for a direct injury to it, though his right to use it be incorporeal merely; e. g. a franchise. In general, however, where an incorporeal right has been interfered with, the appropriate remedy is by *action on the case*. Per Cowen, J., *The Seneca, &c. v. The Auburn, &c.* 5 Hill, 170.

taining to real estate, but purely personal ; such as a patent or copyright, (see chap. 14,) which, in the nature of things, cannot be otherwise invaded than by the exercise of some other real or pretended privilege of the same description ; any injury to such rights, being both consequential and also committed against this peculiar kind of property, is for a double reason a nuisance. A *watercourse*—the subject of injuries which we propose now to consider—may perhaps be regarded as an intermediate kind of property, an immediate injury to which is a trespass, if the owner also owns the soil beneath, but not if his interest is merely in the water ;¹ while the class of injuries for which actions are far most frequently brought, such as the diminution, obstruction or diversion of the water by acts not applied directly to the subject of injury itself, are nuisances. (a) So, in other points of view, it will be seen that the dividing line between nuisance and trespass, or between the action on the case and the action of trespass, in reference to watercourses, cannot be drawn with perfect precision. Thus, although a privilege to build a dam on the land of another, and divert the water for the use of the grantee, is a franchise ;² (b) and an injury caused to the land

¹ 1 Chit. Pl. 176 ; *Griffiths v. Marson*,
6 Price, 1.

² *Conwell v. Brookhart*, 4 B. Mon.
580.

(a) The declaration, in an action on the case, alleged, that the plaintiff was owner of a mill a short distance from one occupied by the defendant on the same stream, and that the defendant “ wilfully, and with intent to injure the plaintiff,” frequently shut down his gates, so as to accumulate a large head of water, and then raised them, by which means an immense volume of water ran with great force against the plaintiff’s dam, and swept it away. Held, that trespass and not case was the proper remedy. *Kelly v. Lett*, 13 Fred. 50.

(b) A right to flow land, by means of a pond created by a dam attached to an ancient mill-site, is a *prescriptive right in a que estate*. *Sargent v. Guttererson*, 13 N. H. 467.

An action by a mill-owner for an obstruction of the stream below his mill and close, whereby the water was prevented from passing off from the wheel

of one man, by the erection of a dam on the land of another, is a nuisance; yet an injury done to that dam itself, being a tangible and corporeal article of property, is a trespass.¹ (a) In general, however, as has been remarked, the right to a watercourse is *incorporeal*, and an injury done to a watercourse is not *immediate*, but the result of the improper use of his own property by the party causing such injury; and therefore the subject may most properly be considered in the present connection.

2. Like *light* and *air*, water is a subject of merely *qualified ownership*. Lord Coke says,² the word "land comprehendeth any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, *waters*," &c. But the well-established doctrine now is, that water is neither *land* nor a *tenement*, and is not demandable in a suit, except as so many acres of land covered with water. It is a movable, wandering thing, and must of necessity continue common by the law of nature. The air which hovers over one's land, and the light which shines upon it, are as much land as water is.³

3. In general, the owner of land upon a river not navigable, or above tide-water, owns to the centre of the stream,

¹ Conwell v. Brookhart, 4 B. Mon. 580. See Fiske v. Framingham, &c. 12 Pick. 68. ² 1 Hill. on R. Prop. (3d ed.) 3; Mitchell v. Warner, 5 Conn. 497; Co. Litt. 4 a.

³ Co. Litt. 4 a.

of his mill, along the stream, in the usual course and as of right it ought to pass; is an action respecting an easement on real estate. Cary v. Daniels, 5 Met. 236; acc. Soule v. Russell, 13 Met. 436.

So is an action by an owner of salt meadow, situate above a mill-dam on a navigable stream, against the owner of such dam, for obstructing the natural ebb of the tide and thereby injuring the grass on such meadow. Turner v. Blodgett, 5 Met. 240, n.

(a) Where the plaintiffs, employed as contractors, to complete a navigable canal, had erected a dam composed of piles and earth, with the consent of the owner of the soil; held, they might maintain trespass against the defendant for breaking and destroying it, but not case. Dyson v. Collick, 1 D. & Ry. 225.

subject to the public right of passage, as upon a highway.¹ (a) But, to constitute a watercourse from one tract of land into another, there must be something more than a mere *surface drainage*, over the entire face of the first tract on to the second, occasioned by unusual freshets or other extraordinary causes.² And a declaration, alleging that a brook run through the plaintiff's land in its natural channel, and across the defendant's land, and that the defendant obstructed the same, is not supported by proof of a right of mere surface drainage, from the plaintiff's land over the defendant's land, without any regular stream, channel, or banks.³ (b) So, if

¹ 3 Hill. on R. Prop. 87; 3 Kent, 431.

² Luther v. Winnisimmet Co. 9 Cush. 171.

³ Ashley v. Wolcott, 11 Cush. 192.

(a) A stream far above tide-water, never declared a public highway by statute, nor capable, in its natural state, of bearing up a stick of timber or log, is not a navigable stream, but merely private property; and, if the owner of the land on each side has built a dam across it, which would be endangered by floating logs down the stream, when swollen by freshets, and any one threatens to do so, the owner of the land is entitled to an injunction. *Curtis v. Keesler*, 14 Barb. 511.

(b) A special verdict found, that a pit in the plaintiff's close, adjoining a close of the defendant in and since 1796, had been principally supplied with water, coming from the defendant's close through an agricultural tile drain for the better cultivation of the land, and which water flowed thence into a ditch, and then into the pit; that the drain came from a hillside through the defendant's close, through a wet, boggy soil, and not from any ascertained source, and that it aided in effecting the general surface drainage of the defendant's close; that the defendant, for the purpose of more effectually draining and cultivating his close, deepened the course of an old drain, and, by making a communication between it and the drain which fed the plaintiff's pit, drew the water from the pit; and that the immediate object was to get a better fall of water from the defendant's close, which previously had been so wet and boggy as to be comparatively unproductive. Held, that, under the above circumstances, no grant of the flow of water to the plaintiff was to be presumed, and that the plaintiff had no right of action against the defendant for the diversion of the water. *Greatrex v. Hayward*, 20 Eng. L. & Eq. 377.

Outside the defendant's land was a wet, springy spot, at which, at most

water raised by a steam-engine from a mine, or flowing from the eaves of houses, is thrown upon adjoining land used by the owner; such use gives no claim to have the privilege continued.¹ But, where land-owners have agreed to have a watercourse made through their respective lands for the purpose of supplying a town with water; an injunction lies against one of them who diverts the stream into its old channel.² So, several proprietors of contiguous land on a stream having contributed jointly to the erection of a dam, and changed the course of the creek, in part at least,

¹ *Arkwright v. Gell, Gale & What.* 182.

² *Duke v. Elgin*, 7 Eng. L. & Eq. 39.

seasons of the year, some water rose to the surface and flowed down the slope of the land. In wet seasons a great body of water flowed down, and after a long drought there was scarcely any, and sometimes none. There was no regularly-formed ditch or channel for the water, the place where it flowed being constantly trodden in with cattle. The water, which was not absorbed, (and all was not absorbed except in times of drought,) ran into an old watercourse of the plaintiff. The water had so flowed for more than twenty years. The defendant, for the purpose of supplying some of his property with water and draining his land, diverted the water in question from the plaintiff's reservoir. At a certain other spot in the defendant's land there had always been, as far back as any one could recollect, water rising to the surface; there had generally been a regular drinking-place for cattle, formed with stones, and the overflow of the water went down a ditch and thence into a watercourse, to the plaintiff's reservoir. The defendant carried a drain under the spot in question, and conveyed away the water to another portion of his property, so that the water ceased to rise to the surface and flow into the plaintiff's reservoir. Held, that in neither case was the plaintiff entitled to the benefit of the flow of the water, and that the defendant was not liable for the diversion. *Rawstron v. Taylor*, 23 Eng. L. & Eq. 428.

One of the accompaniments of a *river*, technically so called, is a *bank*. It is said, "The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water, as to be distinguishable from the banks, by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water." Per Curtis, J., *Howard v. Ingersoll*, 13 How. 426.

by conducting it in a raceway across their lots; the law secures to each the right to a just and reasonable participation in the use of the water, and the rights of the parties are liable to be changed in the same way and under the same circumstances as in regard to a natural stream.¹ And, after an artificial vent has been substituted for the natural channel of a watercourse, it is the duty of the party who obstructed the natural channel to keep such vent in repair.²

4. Every proprietor of land, on the bank of a fresh water river, has a right to the use of the water, as it *was wont to run* (*ut currere solebat*), without diminution or alteration; (a) and no owner has, in general, a right to use it, to the prejudice of other owners above or below him, by throwing it back upon the former, or subtracting it from the latter.³ (b)

¹ *Townsend v. McDonald*, 14 Barb. 460.

² *Brisbane v. O'Neill*, 3 Strobb. 348.
³ 2 Hill. on R. Prop. 98.

(a) The water power, belonging to a riparian proprietor, is said to be the difference of level between the surface where the stream in its natural state first touches his land, and the surface where it leaves it. *M'Calmont v. Whitaker*, 3 Rawle, 84.

(b) Although, in actions relating to watercourses, the conflicting rights of owners above and below are ordinarily brought in question; yet the general rules upon this subject equally apply to *opposite* proprietors. In this, as in the other case, each owner is entitled to the natural use of the *whole water*, and has a remedy against the other for any diversion or diminution of it. *Curtis v. Jackson*, 13 Mass. 507; *Wetmore v. White*, 2 Caines' Cas. in Er. 87; *Canal, &c. v. Havens*, 11 Ill. 554; *Moffatt v. Bremer*, 1 Greene, 348.

The plaintiff and defendant owned different mills on one dam. The plaintiff brings an action against the defendant, for opening a canal into the pond above, for a supply of water to work his mill. The water thus withdrawn was returned to the stream immediately below the dam, and was less in quantity than the defendant would have used at his mill on the dam. By means of a reservoir higher up, the defendant also increased the quantity of water in the stream. Held, both parties were entitled, *per my et per tout*, to their share of the whole stream on its arrival at the dam; and therefore, notwithstanding the above defences, the action was sustained. *Webb v. Portland, &c.* 3 Sumn. 169.

Where the plaintiff, who had no title to the land, beyond the centre of the

The riparian proprietor has, annexed to his lands, (a) *the general flow of the stream*, so far as it has not been already acquired by some prior and legally operative appropriation.¹ “*Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent

¹ *Buddington v. Bradley*, 10 Conn. 213.

channel, erected a dam across the stream, and upon the defendant's land, and so continued it for many years, and until the defendants removed the dam; held, the erection of the dam partly upon the defendant's land, and thus diverting half of the water, was an injury for which the defendants might maintain an action, and therefore might lawfully remove the obstruction. *Adams v. Barney*, 25 Verm. 225.

(a) The right does not depend upon a *personal grant* or long acquiescence on the part of the riparian proprietors, above and below, but arises *ex jure naturæ*, and is an incident of property. *Dickenson v. The Grand*, &c. 9 Eng. L. & Eq. 513.

In an old case it is said, “In this action there was no need that it should be an ancient mill; for if one erect a new mill on his freehold, and another diverts the watercourse of that mill, as it passes by his land, still, if the water used to follow this course, an action on the case lies against him; for he cannot use his land or the water which passes through his land to the damage of the other.” Per Doddridge, J., *Rutland v. Bowler*, Palm. 290.

And no allegation is necessary, that the plaintiff's mill is more ancient than the defendant's. *Beavers v. Trimmer*, 1 Dutch. 97.

In an action for damages to the plaintiff's mill-privilege by the diversion of the water, it is not necessary to aver the manner or the means of the diversion. It is sufficient to aver injury to the privilege, without alleging the existence of a mill. *Stein v. Ashby*, 24 Ala. 521.

But the right of the plaintiff must be accurately stated; and, where it was averred that the plaintiff was entitled to all the water which should rise above a certain mark in a dam, and the evidence showed that he was only entitled to that part of such water which should remain after a prior use by the defendant;” held, a fatal variance. *Wilbur v. Brown*, 3 Denio, 356.

of the other proprietors who may be affected by his operations, the proprietor can neither diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.”¹ Thus the owner of land, over which a stream of water runs, has a right to such use only of the water, as will not materially *reduce its quantity or corrupt its quality*, to the injury of the proprietors below.² And, on the other hand, a land-owner has a right, even without resorting to a prescription, to have the water from his land flow through the natural channels and drains convenient to it. And, when another cuts him off from such right by an embankment, he has a right to remove such embankment.³

5. A distinction has been made between the title to streams above ground and *subterraneous* streams; and it has been held, that, independently of a claim by prescription, a party, having the benefit of a stream of the latter description, cannot maintain an action for its subtraction or diversion by another owner, enjoying the like benefit.⁴ In reference to a claim of this nature, it is remarked in a leading case: “We think that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that, if in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor’s well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*.”⁵ But the contrary doctrine has also been held, that, where a spring is supplied by a subterraneous stream, an owner

¹ Per Sir J. Leach, V. C., *Wright v. Howard*, 1 Sim. & Stu. 203; *Mason v. Hill*, 3 B. & Ad. 312.

² *Wheatley v. Chrisman*, 24 Penn. 298.

³ *Overton v. Sawyer*, 1 Jones, Law, 308.

⁴ *Acton v. Blundell*, 12 Mees. & W. 324; *Roath v. Driscoll*, 20 Conn. 533.

⁵ Per Tindal, C. J., *Acton v. Bell*, 12 Mees. & W. 324.

of the land above the spring cannot divert the stream to the injury of those who use the spring, or on whose land the stream comes to the surface as a spring, more especially where the underground flow of water is so well defined as to be a constant stream.¹ So, where the water from a spring flows in a gully or natural channel to a stream upon which the plaintiff has a mill, and the spring is cut off at its source, and the water received into a tank as it rises from the ground, by the license of the owner of the soil on which the spring rose; an action lies against the party thus abstracting the water.² (a)

¹ Smith v. Adams, 6 Paige, 435; ² Dudden v. Guardians, &c. 38 Eng. Wheatley v. Beaugh, 25 Penn. 528. L. & Eq. 526.

(a) In reference to *subterraneous water*, generally,—including *streams*, *aqueducts*, *springs*, and *wells*—the law can hardly be considered as perfectly settled.

It is held, that the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, even if by so doing he intercept one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing through the land of each, and thereby diminish the supply of water, to the injury of the adjoining proprietor. *Ellis v. Duncan*, 21 Barb. 230.

So, where a spring is produced by percolations through the land of the owner above, and in the use of the land for mining the spring is destroyed, he is not liable, unless guilty of negligence or malice. 25 Penn. 528. And one in possession of land, containing a spring, may use it for culinary purposes and watering cattle, even by artificial means; as, for instance, by an aqueduct leading to his house and barn. *Wadsworth v. Tilotson*, 15 Conn. 366.

A bill in equity is held to lie, for the diversion of water from a spring and watercourse, by digging a deep well and fountain. *Dexter v. Providence*, &c. 1 Story, R. 337.

So an action lies in favor of a riparian proprietor, either upon a special statute or an express agreement, for the abstraction of water which never made part of the river, but has been prevented from doing so in its natural course by the digging of a well; whether the water was part of a subterraneous stream, or percolated through the strata, and though no actual injury be sustained. *Dickinson v. The Grand*, &c. 9 Eng. L. & Eq. 513.

But the owner of land may dig a well on any part of it, though he thereby

6. As already stated, every proprietor of land on the bank of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the proprietors above or below him; and may begin to exercise that right whenever he will.¹ It has indeed been sometimes laid down, that by *the first occupancy* of a stream a party acquires a *property in the current*.² And this has been recognized in some American cases as the common-law doctrine.³ But, as may be gathered from the general course of authorities cited in this chapter, the well estab-

¹ *Sampson v. Hoddinott*, 19 Com. B. 590; 38 Eng. L. & Eq. 241.

² *Hatch v. Dwight*, 17 Mass. 289; *Martin v. Bigelow*, 2 Aik. 184.

³ 2 Bl. Comm. 403.

diminishes the water in his neighbor's well, unless the latter has gained an adverse right by grant or prescription, or unless the act is done merely with a malicious intent. *Greenleaf v. Francis*, 18 Pick. 117. It is said: "The proprietor, in the absence of any agreement subjecting his estate to another, may consult his own convenience in his operations above or below the surface of his ground. He may obstruct the light and air above, and cut off the springs of water below the surface. The proprietor must, at his peril, so place his house and make his excavations below it, as to obtain water, air, and light, even if his neighbor should exercise his full rights of dominion upon his adjoining estate. Now the case finds, that the defendant dug his well in that part of his own ground where it would be most convenient for him. It was a lawful act, and although it may have been prejudicial to the plaintiff it is *damnum absque injuria*." Per Putnam, J., 18 Pick. 117.

The adverse or exclusive use of water, flowing through an *aqueduct*, by the owners and occupants of a house, for twenty years, furnishes presumptive evidence of a grant from the owner of the land through which it is brought. *Watkins v. Peck*, 13 N. H. 360.

The owner of two adjoining messuages and lots, one occupied and the other leased by him, constructed a *drain* from one through the other into a common sewer, and suffered his tenants to use it more than ten years. He afterwards sold the lots to different persons at the same time, not mentioning in the deeds any right of *drain*. Held, one purchaser might close up the drain of the other's lot which passed over his land, if by reasonable labor and expense another might be made elsewhere. *Johnson v. Jordan*, 2 Met. 234.

lished doctrine now is, that running water cannot be appropriated by mere prior occupancy, but only by express grant, general consent, or continued use.¹ (a) Thus one, who erects a mill and dam upon a stream, does not, by the mere prior

¹ Tyler v. Wilkinson, 4 Mas. 400.

(a) With a general similarity between the elements of light and air on the one hand and running water on the other, as the subjects of qualified ownership; the marked distinction has been pointed out, that the former *have no owner*, until appropriated, while the latter, as incident to the land over and through which it flows, belongs, in a qualified sense, to the owners of such land, and cannot therefore be appropriated by one to the exclusion of others. Per Story, J., Tyler v. Wilkinson, 4 Mas. 400.

It is said, "Water flowing is *publici juris*. By the Roman law, running water, light, and air, were considered some of those things which were *res communes*, and which were defined as things, the property of which belongs to no person but the use to all." Per Tindal, C. J., Liggins v. Inge, 7 Bing. 692. See Dilling v. Murray, 6 Ind. 324.

The following accurate distinctions and lucid illustrations are found in a late case in Massachusetts: "The erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land. In such case, the proprietor who first erects his dam for such a purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use. For the same reason, the proprietor below cannot erect a dam in such a manner as to raise the water and obstruct the wheels of the first occupant. Such appears to be the nature and extent of the prior and exclusive right, which one proprietor acquires by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior legal right, but from a legitimate exercise of his own common right. But such appropriation of the stream to mill purposes gives the proprietor a prior and exclusive right to such use only so far as it is actual. If, therefore, he has erected his dam and mill, with its wasteways, sluices, and other fixtures necessary to command the use of the water to a certain extent, and there is a surplus remaining, the proprietor below may have the benefit of that surplus. If he erects a dam and mills for the purpose of using and employing such surplus, he is, as to such part of the stream, the first occupant, and makes the first appropriation. As to that, therefore, his right is prior and exclusive." Per Shaw, C. J., Cary v. Daniels, 8 Met. 466.

occupation, unaccompanied with such a length of time that a grant may be presumed, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted, and he is in some degree injured.¹ (a) But, on the other hand,

¹ Platt v. Johnson, 15 Johns. 213.

(a) A. erected a mill in 1823, on his own land, the former owner of which had, for twenty years before 1818, appropriated the water of a stream, running through it, to the purposes of watering his cattle and irrigating his land. In 1818, B. had erected a mill near the same stream, and the owner and occupier of A.'s land then gave a parol license to B. to make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream, above the spot where A.'s mill was afterwards erected. In 1818, B., without license, conveyed part of the water, which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828, A. appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829, A. demolished the dam erected by B., and gave him notice not to divert the water. B. then erected a new dam lower down the stream, and by means of it diverted from A.'s mills, at some times, all the water before appropriated by A.; at others, a part of it; and the water, when returned into the stream, was in a heated state. Held, on special verdict, 1st. That, whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A. was entitled to the surplus water; for he was the first occupant of that, and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

2d. That A. was in like manner entitled to recover in respect of the water diverted by B. at his new dam; because the license granted to B. by the former occupier was, to take the water at one particular point, and not at the place where his dam was made; and further, because, if the license had been general to take at any place, it would have been revocable, except as to such places where it had been acted on, and expense incurred; and it was revoked before the last dam was erected.

3d. That A. was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818; for the possessor of land, through which a natural stream flows, has a right to the advantage of that

any proprietor may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it, although the defendant first appropriated the water to his own use; unless he has had twenty years' undisturbed enjoyment of it in the altered course.¹ So where the plaintiff, a riparian proprietor, had used the water for more than fifteen years—the period requisite to give a prescriptive right—for a mill, by conducting it through a raceway into a reservoir, and thence to the mill; and the defendant, an owner above, afterwards obstructed the natural flow of the water, the plaintiff having a short time before given up his reservoir, in consequence of which he required more water, and but for which he would have suffered no injury; it was held, that an action might be sustained; that the plaintiff had a right to the flow of the water, not by his artificial channel, or into his reservoir, but within its banks, through his lands, as it was wont; and that his mode of using the water was immaterial, except as affecting the damages.² So where A., an owner upon a stream, diverted the water upon a channel, through the banks of which the water percolated, and passed into the soil of B.; and B. afterwards erected a house, the foundation of which being sunk below the soil, the water became injurious; held, A. could no longer justify filling his channel.³ So where the defendant, an owner above, by a wear or dam diverted the water; and, about ten years afterwards, the plaintiff, the adjoining owner below, made a channel in his own land, contiguous to the stream, for some purpose of manufacturing not previously carried on; the defendant was held to have acquired no right

¹ *Mason v. Hill*, 3 Barn. & Ad. 304.

² *Cooper v. Barber*, 3 Taunt. 99.

³ *Buddington v. Bradley*, 10 Conn. 213.

stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment. *Mason v. Hill*, 5 B. & Ad. 1.

against the plaintiff by his use of the water.¹ So it is no defence to an action, that the interruption would have caused the plaintiff no injury, if he had continued to use the water as he had formerly done. As, for example, where the plaintiff had lowered his *hammer-wheel*.²

7. It is the prevailing rule, that a riparian proprietor is entitled to nominal damages for a diversion of the water from his mill, without any proof of actual damage.³ That the wrongful diversion of a stream of water implies some damage;⁴ inasmuch as a repetition of the injury might establish an adverse right.⁵ More especially a diversion of a large portion of the water of a natural watercourse, by a proprietor of land through which the watercourse runs, renders him liable to an action on the case by a proprietor of land below, from which the water is thus diverted; although the latter thereby sustains no present actual damage.⁶ So, in an action for turning the course of an ancient stream, so that it no longer flowed on the lands of the plaintiff, it is *an intendment of law* that the plaintiff, by the loss of the water, was thereby injured; and evidence that, in consequence thereof, he was compelled to haul water from a distance, to supply the uses of the stream, is proper and admissible, to give the jury certain data upon which they may estimate the real damages; and it is not claiming damages for a distinct injury, not necessarily resulting from the nuisance.⁷ But on the other hand it has been held, that the owner of a mill is not entitled to damages for a mere theoretical injury to his mill, occasioned by another mill on the same stream, though for any actual perceptible injury he is entitled to recover.⁸ And the same rule has been applied to an action, brought by a lower riparian proprietor

¹ *Mason v. Hill*, 3 B. & Ad. 304.

² *King v. Tiffany*, 9 Conn. 162.

³ *Stein v. Burden*, 24 Ala. 130; *Butman v. Hussey*, 3 Fairf. 407; *Bolivar, &c. v. Neponset, &c.* 16 Pick. 247; *Plumleigh v. Dawson*, 1 Gilm. 544; *Hendrick v. Cook*, 4 Geo. 241. See *Mason v. Hill*, 1 B. & Ad. 1.

⁴ *Chatfield v. Wilson*, 1 Williams, 630.

⁵ *Steen v. Ashby*, 24 Ala. 521; *Tilbotson v. Smith*, 32 N. H. 90.

⁶ *Newhall v. Ireson*, 8 Cush. 595.

⁷ *Hart v. Evans*, 8 Barr, 13.

⁸ *Thompson v. Crocker*, 9 Pick. 59.

against an upper one, for a diversion of part of the water of a natural watercourse flowing through their lands.¹ (a) And the owner of a lower water privilege has no right of action against the owner of an upper privilege, for a diversion of the water, where, on account of the rights of an intervening proprietor, he is not entitled to use the water so diverted.² And, in general, any diversion of running water, not injuriously affecting other proprietors, is allowable.³

8. With regard to the nature and amount of the injury, it is held, that any benefit derived by the plaintiff from the act complained of may be taken into consideration.⁴ And only the direct and immediate damage can be allowed. Thus a railroad corporation, building a bridge across a stream, are liable for the damage thereby occasioned to the owner of a saw-mill above, by the obstruction of the stream, so as to prevent the water from passing off from his mill as freely as it had previously; but are not liable for the damage suffered by him, by being impeded and put to increased expense in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts or not.⁵

¹ Elliot v. Fitchburg Railroad Co. 10 Cush. 191.

² Olney v. Fenner, 2 R. I. 211.

³ Ford v. Whitlock, 1 Williams, 265.

⁴ Addison v. Hack, 2 Gill, 221.

⁵ Blood v. Nashua, &c. 2 Gray, 137.

(a) It is somewhat difficult to extract from the decided cases any settled rule upon this subject. On the one hand, we find the phrases, *sensibly injurious—public convenience and general good—useless and unproductive—fair proportion—partial loss—unrestricted use—destructive*, importing that a mere violation of a party's right is not sufficient to maintain the action; while other expressions regard *the right* as the only essential point of inquiry.

A question has been made, in regard to the word *unappreciable*, whether it properly means "so inconsiderable as to be incapable of value or price." Embrey v. Owen, 4 Eng. L. & Eq. 466.

As affecting the question of damage, the capacity of the stream, the adaptation of machinery to it, and all attendant circumstances, are to be taken into view. Dilling v. Murray, 6 Ind. 324.

9. With regard to the question, what is a justifiable use of water, in reference to the rights of other owners; it is held, that a person owning an upper mill has a legal right to use the water, and may apply it to work his mill, subject to such reasonable limitations as the rights of the mill-owner lower down the stream require him to observe; but if, by an unreasonable use, the lower mills are essentially impaired in their usefulness, the law will interpose and limit the common right; so that the owners of the lower mills shall enjoy a fair participation in the use of the stream. And the Court cannot lay down any rule which shall limit the precise boundaries of the rights of such owners, in all cases; but the question of reasonable use of the water by the mill-owner above, depending as it must on the ever-varying circumstances of each particular case, must be determined by the jury.¹ With more particular reference to an ordinary and important use of the watercourse alone; it has been held, that the owner of land, adjoining an ancient brook, may lawfully divert the water, for the purpose of *irrigating his close*; although a close adjoining the brook below becomes less productive by that means.² It is said, "A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle or irrigating his close; and he may do this, either by dipping water from the brook and pouring it upon his land, or by making small sluices for the same purpose; and, if the owner of a close below is damaged thereby, it is *damnum absque injuriâ*."³ So where, in an action on the case, founded on an irrigation, against a riparian proprietor above, by a mill-owner below, it appeared that the irrigation was not continuous, but intermittent, when the river was full, and that the working of the mill was not thereby affected, nor the water diminished perceptibly to the eye; it was held, that the action would not lie.⁴ But a party cannot, by irrigation,

¹ Thomas v. Brackney, 17 Barb. (N. Y.) 654.

² Weston v. Alden, 8 Mass. 136.

³ Weston v. Alden, 8 Mass. 136; Perkins v. Dow, 1 Root, 535; Anthony v. Lapham, 5 Pick. 175.

⁴ Embrey v. Owen, 4 Eng. L. & Eq. 466.

lawfully diminish the quantity of water which has been accustomed to flow to a mill of forty years' standing, so as to impede its operation.¹ And the more recent doctrine is, that the owner of land, through which a natural stream flows, cannot divert the water for the purposes of irrigation, without returning the surplus into the natural channel, and thereby deprive the owner of land below of his privilege to use the water in the same manner.² (a) And the still more rigid rule has been sometimes laid down, that, if the supply of water is no greater than the riparian proprietors need for the natural uses, none of them can subtract it for the purposes of irrigation or *manufacturing*.³ And, in illustration and justification of this doctrine, it is said, "These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied in order to his existence. Artificial, such only, as by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized

¹ Cook v. Hull, 3 Pick. 269.

² Evans v. Merriweather, 3 Scam.

³ Anthony v. Lapham, 5 Pick. 175. 494.

(a) The plaintiff had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; and, although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times, that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows; and, although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day, that the plaintiff was deprived of the power to use it fully. Held, this detention of the water by the defendant was a use of it, which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action; and this without proof of actual damage to the plaintiff's reversionary interest, the law inferring damage from an obstruction of his right. *Sampson v. Hoddinott*, 19 Com. B. 590; 38 Eng. L. & Eq. 241.

life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish. The supply of a man's artificial wants is not essential to his existence—he could live if water was not employed in irrigating lands, or in propelling his machinery. So of manufactures, they promote the prosperity and comfort of mankind, but cannot be considered absolutely necessary to his existence. An individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have a right to use the whole of it, if necessary, to satisfy his natural wants. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures.”¹ So it has been held, in an action of the case for diverting a watercourse, that, if one has *ancient pits* in his land, which are replenished by a rivulet, he may *cleanse* them, but cannot *change* or *enlarge* them.² (a) So, although the owner of a superior estate may improve his lands, though he thereby throw increased waters on his inferiors, *through the natural channels*, he cannot dig new channels therefor, and the lower owner may lawfully erect an impediment to the increased flow, but to no more.³ And, in general, an upper proprietor of a more ancient mill has not a right, as against a more recent mill-owner below, to use the water as his own

¹ *Evans v. Merriweather*, 3 Scam. 496.

² *Kauffman v. Griesemer*, 26 Penn.

³ *Brown v. Best*, 1 Wils. 174.

407.

(a) In trespass *quare clausum*, the defendant pleaded a general right to enter the plaintiff's land to cleanse a watercourse, which was the trespass complained of. Held, this plea was not supported by evidence of the particular right to use the watercourse and cleanse it, so as to drain the defendant's meadows. *Darlington v. Painter*, 7 Barr, 473.

convenience or interest may dictate; but is bound to use it in a reasonable and proper manner. Thus a jury may find the constant use of the water entirely by night, and a detention of it during the day, to be an improper and unreasonable use, and, if so, an action lies, although such use is in good faith, and with no design to injure the rights of others.¹ And the reasonableness of the detention of water, as to time, is a question for the jury.² So an action lies, if the owner of the mill above shuts down the gate, and detains the water for an unreasonable time, or lets it out in such unreasonable quantities as to prevent the owner of the mill below from using it, or in any way deprives him of the reasonable and fair participation in the benefits of the stream.³ And the owner of a mill built after and above another is liable in damages, if he so uses the water that the lower mill is rendered less profitable than before; though it be by reason of improved machinery in the upper mill.⁴ So the owner of a mill, who is entitled to use only the surplus water not required by another mill, is bound to shut his gate when there is not a sufficiency of water for both. But, if the other mill-owner in such case undertakes himself to prevent the passage of the water to the mill first mentioned, he will be liable to an action, if he does not remove the obstruction as soon as the deficiency of water ceases.⁵ And, where the defendant was owner of an existing mill-dam, and the plaintiff rightfully erected a mill-dam above it on the same stream; it was held, that the defendant had no right to increase the height of his dam to a level with the plaintiff's wheel, and thereby to obstruct the wheel by back-water.⁶ (a) And

¹ *Barrett v. Parsons*, 10 Cush. 367;
Merritt v. Brickenhoff, 17 Johns. 306.

² *Hetrich v. Deachler*, 6 Barr, 32.

³ *Merritt v. Brickenhoff*, 17 Johns. 306.

⁴ *Wentworth v. Poor*, 38 Maine, 243.

⁵ *Sumner v. Foster*, 7 Pick. 32.

⁶ *Sumner v. Tilestone*, 7 Pick. 198.

(a) But, where the plaintiff erected a dam across the outlet of a pond, and acquired a right by prescription to use the water; it was held, that the erection of a new dam by the defendants, higher than the old one, was not

the owner of land through which a stream passes has no right to make such use of it, as to send it down to an owner below, poisoned or corrupted. Thus the water may be used in connection with a tanyard or bark-mill, if so much only be taken away as is necessary for this purpose; but the residue cannot legally be soiled by admixture with foreign substances, to the injury of another proprietor. So an action lies against a glover, who sets up a lime-pit so near the water as to corrupt it.¹ (a)

10. It will be presently seen, that in many of the United States express statutes have been enacted, in virtue of which the water of a stream may be applied to mill purposes, without subjecting the party making such a use of the water to a common-law action for damages; such statutes themselves providing a remedy more precisely adapted to the nature of the injury. But, where the proprietor of land, through which a stream flows, has actually built or is building a mill thereon, a proprietor below cannot, without a right acquired by grant, prescription, or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege, simply under a liability to pay damages, pursuant to the statutes for the regulation of mills; nor do those statutes

¹ *Bealey v. Shaw*, 6 E. 203; *Howell & Ell*, 571; *Stonehewer v. Farrar*, 6 Ad. v. *M'Coy*, 3 Rawle, 256; *Aldred's case*, & *Ell. N. S.* 730. 9 Co. 57 b; *Magor v. Chadwick*, 11 Ad.

in itself an infringement of the plaintiff's rights; for the plaintiff had a right to adapt and use the new dam to the height of the old one; but that the defendants were entitled, as against the plaintiff, to use the water, when raised by means of the new dam above the top of the old dam, provided they did not thereby in any manner prejudice the rights of the plaintiff. *Rogers v. Bruce*, 17 Pick. 184.

(a) Erecting a cesspool near a well, *Norton v. Scholefield*, 9 M. & W. 565; the precipitation of minerals, *Wright v. Williams*, 1 M. & W. 77; and the corrupting of the atmosphere by the use of a watercourse, *Story v. Hammond*, 4 Ohio, 833; have all been held actionable injuries.

So it is held that an action lies by any party injured, against any party instrumental in causing the injury, and for any mode of corrupting the water. *Carhart v. Auburn*, &c. 22 Barb. 297.

apply to such a case.¹ And no person can avail himself of the statutory privileges of a mill-owner, merely by erecting a dam, unless a mill is built in connection with the dam, or he has an intent forthwith to erect such mill. Otherwise he is liable at common law only for flowing.² So when a mill is disused and removed, and not replaced.³ Nor does a statute, authorizing a proprietor of land, through which a natural watercourse runs, to lay a pipe or culvert, from such watercourse, across a highway, to his mill, protect him from an action by a proprietor below, from whose land the water is thus diverted.⁴

11. As a watercourse cannot be applied to its most valuable uses without the aid of a *dam*, every owner has the right to erect such dam; and neither the loss of water by evaporation from a pond thereby raised, nor the occasional increase or diminution of the quantity of water, or the acceleration or retardation of the current below, constitutes any legal ground of action against him. But the question turns upon the nature and extent of the injury.⁵ Thus A., the owner of land and mills, on a stream above the land and more ancient mill of B. on the same stream, increased the height of his dam, and kept back the water only so long as was necessary to fill his pond; whereby B.'s mill was temporarily stopped. Held, that this was not an unreasonable use of the stream, and B. had no cause of action.⁶ But, on the other hand, a proprietor of land upon a stream will not be debarred of his natural rights in the water, by authorizing a dam above his land. Thus B. built a dam on land of A., by his verbal permission, and subsequently a mill below; and A.'s grantee subsequently built a mill between the dam and the lower mill. Held, the ownership of the soil gave A.'s grantee no right to use the water to the detriment of the lower owner, who had the same right to the use of the

¹ Bigelow v. Newell, 10 Pick. 348.

² Fitch v. Stevens, 4 Met. 426.

³ Baird v. Hunter, 12 Pick. 556.

⁴ Newhall v. Ireson, 8 Cush. 595.

⁵ Tyler v. Wilkinson, 4 Mas. 401;
Palmer v. Mulligan, 3 Caines, 307.

⁶ Pitts v. Lancaster Mills, 13 Met.
156.

stream as if no dam existed.¹ And the grant of a right to make a dam will be strictly construed in favor of the party whose rights are thereby affected. Thus, under a grant of a mill, "also the mill-yard and all other appurtenances and privileges, roads and appendages belonging to said mill, with the right of digging, damming, and flowing for the accommodation of said mill," the grantee has not a right to erect a trough on the grantor's adjoining land, to conduct the water to the mill, no such trough having existed at the time of the grant, and the place where it was erected not having ever been flowed by the mill-dam.² And, although a mere verbal license is sufficient to justify the erection of a dam upon land of the licensor; yet, after the revocation of such license, the dam becomes a nuisance, and a bill in equity lies for its abatement. Thus S. gave to J. an oral license to erect and continue a mill-dam on S.'s land, and to dig a ditch through said land, to convey water to a mill that J. was about to build on his own land. J. erected the dam and dug the ditch, and afterwards erected the mill, and continued them during the life of S. After S. had granted the license, he conveyed his land to M., without any reservation. J. continued the dam and ditch, after the decease of S., for the purpose of working the mill, and M. requested him to remove the dam and fill up the ditch, and, upon J.'s refusal so to do, attempted to remove the dam, and tore down a part of it, when J. forcibly interposed, prevented M. from proceeding further, and repaired the injury. M. thereupon filed a bill in equity, praying that J. might be enjoined and prohibited from any longer continuing the dam, which was alleged to be a nuisance, and that the same might be abated. On an issue framed and submitted to a jury, they found that the dam was a nuisance. Held, M. was entitled to these decrees, but that J. was not responsible for any acts done in pursuance of the license before it was countermanded, and therefore not liable to pay any expenses incurred by M. in

¹ *Pitman v. Poor*, 38 Maine, 237.

² *Miller v. Bristol*, 12 Pick. 550.

removing the old dam; but that he was liable for building a new dam or repairing the old one after the license was countermanded, and that M. was entitled to have the same abated at the expense of J.¹ But a license to erect a dam on land of the licensee cannot be thus revoked, more especially after the lapse of twenty years. Thus the owner of a mill privilege gave the owner of lands flowed thereby an oral license, to erect a dam on the land of the licensee, and also to dig a ditch across the land of the licensor, to drain the water from part of the licensee's land; and under this license the dam was erected and the ditch dug. Held, the licensor could revoke the license to dig the ditch, even after the expiration of twenty years, but not the license to build the dam; and, the licensor having undertaken to revoke the whole license, and after notice to the licensee made an incision in the dam, that the licensee was justified in making a ditch on his own land to draw off the water so thrown upon it; although he thereby diverted the water from the licensee's mill-pond also.²

12. The rights and liabilities of *opposite* owners upon a watercourse are often brought in question in reference to the erection of dams, (p. 107, n.) Thus where a dam, owned by the proprietor of land on one side of a river, is joined to the opposite shore by consent of the owner of land there, that owner may so far interfere with the dam, as to enjoy his own rights on that shore, but he cannot appropriate to his own use the materials of the dam.³

13. Where there are mills on both sides of a watercourse, and the owner on one side has the exclusive right to use the whole of the water, when there is not enough for both; he has not a right to erect a permanent dam to turn the water to his mill, but must rely on his legal remedy, if his right be infringed by the owners on the other side.⁴

14. The defendant, owning the land on one side of and under a stream to the middle thereof, and also on both sides

¹ *Stevens v. Stevens*, 11 Met. 251.

² *Morse v. Copeland*, 2 Gray, 302.

³ *Trask v. Ford*, 39 Maine, 437.

⁴ *Curtis v. Jackson*, 13 Mass. 507.

and under the stream at a place below, builds a mill at the place last mentioned, the dam of which causes the water of the stream to flow back to a dam and mill erected by the defendant at the place first mentioned, so as to prevent the plaintiff's mill from being wrought. Held, the defendant was not answerable to the plaintiff in damages.¹

15. If the plaintiff owns a mill on one side of a river, and the defendant on the other, with a dam in common; and each is entitled to the water, alternately, six months in the year; each has a right to repair his own flume at any time of the year; more especially where each has a right to the surplus water not required by the other's mill. And if the defendant uses ordinary diligence in making the repairs, he will not be responsible for an accidental damage to the plaintiff. Thus where, in order to prevent great injury to both parties from an accident occasioned by him in making repairs, but without negligence on his part, he found it necessary to raise the waste gate and remove the flash boards of the plaintiff; it was held, that he was not liable for the damage.² (a)

16. Where a stream, by the act or neglect of the owner, is made to *overflow* adjoining land; this is an actionable injury.³ (b) Thus the owner of a superior estate may im-

¹ Jewell v. Gardiner, 12 Mass. 311.

Haddon, Cro. Jac. 556; Lev. 193; Sir

² Boynton v. Rees, 9 Pick. 528.

Neil, &c. v. Earl, &c. 3 Bligh, 414.

³ Gilbert's case, Godb. 59; Brent v.

(a) The degree of care, which a party who constructs a dam across a stream, is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. Per Walworth, Ch., Mayor, &c. v. Bailey, 2 Denio, 433.

(b) An agreement not to claim damages for flowing one's land, if the other party will erect a dam and mill, is not the conferring of any right, interest, or easement in land, but only a waiver of a claim for pecuniary damages, and need not be in writing. French v. Owen, 2 Wis. 250; Smith v. Goulding, 6 Cush. 154; Seymour v. Carter, 2 Met. 520.

But the permanent right to flow land by backwater, derived from grant

prove his lands, though he thereby throw increased waters on his inferiors, through the natural channels; but he cannot dig new channels therefor. The lower owner may lawfully erect an impediment to the increased flow, but to no more.¹ So the owner of a mill is liable to an action, if he cause the water upon a stream to be accumulated during the wet season, and draw it off in the summer, so as to cause a greater flow than usual, by means of which the banks of the proprietor below are washed away, his land drowned, and his grass depreciated; although the damage done thereby is small.² And, on the other hand, a man has no right to erect a mill-dam on his own land, so as to throw the water back to his neighbor's line in the ordinary stage of the stream, and thus cause his neighbor's land to be overflowed by the natural swelling of the stream at certain seasons of the year.³ And the causing of backwater, or increasing the quantity of water on the land of an upper proprietor, is an

¹ *Kaufman v. Griesemer*, 26 Penn. 407.

² *Gerrish v. New Market, &c.* 10 Fost. 478.

³ *McCoy v. Danley*, 20 Penn. 85.

or prescription, is an easement or incorporeal hereditament. *Morgan v. Mason*, 20 Ohio, 401; *Pearson v. Tenny*, 3 Dane, 14; *Hazard v. Robinson*, 3 Mas. 272.

One *tenant in common* has no right, by means of a dam erected on other lands of which he is sole seized, to flow the land owned in common, without the consent of his co-tenants, nor can he, by grant of the land of which he is so sole seized, convey such right of flowage to his grantee. *Hutchinson v. Chase*, 39 Maine, 508.

Where the owner of land through which there is a ditch, whether natural or artificial, which drains the upper part of the land, sells the upper part, including a portion of the ditch, he has no right to stop or obstruct the ditch below, so as to throw the water back upon the upper part. *Shaw v. Etheridge*, 3 Jones, Law, 300.

In case of two adjoining fields of unequal height, the owner of the lower one is obliged to receive the water falling from the upper; and, if the former dam up the water by building upon his own land, he cannot recover from the latter for the consequent injury to his own property. *Laumier v. Francis*, 23 Mis. 181.

actionable injury, though he has erected no mill, and suffers no actual damage.¹

17. If one having the right to maintain a dam to a certain height raise it, and thereby raise the water, so as to break the bank and overflow the land of a riparian proprietor, he cannot enter upon the land so overflowed, and erect an embankment upon the outer margin of it, for the purpose of preventing the escape of the water in that direction.² Nor can A. justify the obstructing of water so as to flood the land of B., upon the ground that C. changed the channel and thereby caused the water to flow on the land of A.³ But, when a drain is made to discharge itself upon private land without the owner's consent, and he has not acquiesced for twenty years, he is not liable to an action at law, nor to the process prescribed by the mill act, for raising a mill-dam on his land, and thereby obstructing the drain and flowing the cellars connected with it.⁴

18. In regard to the amount of damages for flowage, (see § 7,) the general rule is adopted, that the plaintiff is entitled to *substantial compensation*; and, in case of trivial injury, to merely nominal damages.⁵ But flowage for a day or an hour is sufficient to maintain an action.⁶ And it has been held, that, if the right of the plaintiff to damages, for overflowing his land, has been established by a former suit, he is entitled, in a subsequent one, to such damages, as will *punish* the defendant and compel him to abate the nuisance.⁷ But, in a complaint for flowing land, the inquiry is to be restricted to damage arising *immediately* from the dam complained of.⁸ (a) The rule of damages is held to be the loss

¹ Merritt v. Parker, 1 Cox, 460.

⁵ Kemmerer v. Edleman, 23 Penn.

² Feasenden v. Morrison, 19 N. H. 143. See Cooper v. Hall, 5 Ohio, 322.

⁶ Cory v. Silcox, 6 Ind. 39.

³ Amick v. Tharp, 13 Gratt. 564.

⁷ M'Coy v. Denley, 20 Penn. 85.

⁴ Cotton v. Pocasset Man. Co. 13 Met. 429.

⁸ Underwood v. North Wayne, &c., 38 Maine, 75.

(a) In an action for damages occasioned by the filling up by the defendants of their land, lying adjacent to that of the plaintiff, whereby the free

arising to the proprietor from the direct injury done to his estate, as a whole, by flowing, deducting therefrom any benefit which may arise from the same cause, but not benefits which he may derive, in common with the owners of other lands similarly situated, by reason of the erection of a mill.¹ Nor any benefit that such flowing may cause to another part of his land.² Or to the public.³

19. In some of the United States, the subject of mills is regulated by express statutes. These chiefly relate to flowage; and their general purport is, to authorize the erection of dams, which overflow adjoining lands, and to provide a special remedy for the recovery of damages thereby caused. It is foreign from the plan of the present work to state in detail these statutory provisions. In general, they are substantially similar to those in Massachusetts, which may be referred to in connection with such points as have been made the subject of judicial construction. (a) It will be

¹ *Brower v. Merrill*, 3 Chand. 46.

² *Engard v. Frazier*, 7 Ind. 294.

³ *Gerrish v. New Market, &c.*, 10 Fost. 478.

flow of water off the plaintiff's land, as formerly existing, had been obstructed; instructions to the jury were held correct, that they should take into consideration the evidence on both sides bearing on this point, and, if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular, they would in assessing the damages make an allowance for such benefit, and give the plaintiff such sum in damages as they found upon the evidence would fully indemnify and compensate him for all the damage he had actually sustained. *Luther v. Winnisimmet Co.* 9 Cush. 171.

(a) By the Rev. Stats. of Massachusetts, ch. 116, any person may erect and maintain a water-mill and a dam to raise water for working it, upon and across any stream, &c.; but no such dam shall be erected to the injury of any mill lawfully existing on the same stream, nor of any mill-site on the same stream on which a mill or mill-dam shall have been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site shall have been lost, &c. And any person, whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint pursuant to the statute.

seen that the most frequent question has been, whether a particular injury, arising from the erection of a dam or mill, should be redressed by the special statutory complaint, or by the common-law action on the case. (a) Thus, where the plaintiff, being the owner of land bordering on a stream, began to erect a mill-dam thereon, none having existed there previously; and, before it was finished, the defendant began and completed a mill-dam below, whereby the plaintiff's mill privilege was destroyed; it was held, that the erection of the dam by the defendant was lawful, and the plaintiff could not maintain an action on the case for the injury, but his remedy was by complaint under the statute.¹ So, where a dam above has been erected for mill purposes, the owner below has no right to flow out such dam, even before a mill has been erected or commenced thereon, unless the design of building a mill has been abandoned. And the erection of a dam on a mill privilege, available for mill purposes, is *prima facie* evidence that the dam is intended for such purposes, although the dam is weak or slightly built.² And a complaint under the statute is the proper remedy, where the owner of a mill erects a dam, across the outlet of a pond, which flows into the stream on which his mill is situated, for the purpose of creating a reservoir for the use of his mill, and land is flowed by means of such dam.³ And where land is flowed during the existence of such a statute, a right of

¹ Baird v. Wells, 22 Pick. 312.

³ Shaw v. Wells, 5 Cush. 537.

² Mowry v. Sheldon, 2 R. I. 369.

(a) In this point of view, such statutes are held not open to the objection of *unconstitutionality*, because they merely *substitute* one process for another. Sowell v. Flagg, 11 Mass. 364.

They are designed to provide for the case, where the absolute right of each proprietor to use his own land and water privileges at pleasure cannot be fully enjoyed, and one must of necessity in some degree yield to the other. Fiske v. Framingham, &c. 12 Pick. 68.

The reasons of the mill acts are said to be now obsolete. Jordan v. Woodward, 40 Maine, 317.

action becomes vested by virtue of the statute, which is not affected by its subsequent repeal, although prior to the institution of a suit; and an action at common law cannot therefore be sustained.¹ So, if an owner of land flowed sells and conveys the land before he has proceeded against the mill-owner for damages, he may afterwards maintain a complaint on the statute.² So, after a verdict for annual damages allowed and recorded, he may maintain an action under the statute against the owner or occupant of the mill, for the sum due and unpaid for the three years next preceding the commencement of such action, although the mill and dam are destroyed; provided the owner has not abandoned his mill privilege.³ But a complaint for flowing land, by means of a mill-dam, should allege that the dam was erected across a stream of water *not navigable*.⁴ The mill act, of Massachusetts, does not apply to tide mills.⁵ (a) And, being designed to provide for the most beneficial occupation and enjoyment of *natural* streams and watercourses, the statutes in question do not authorize the mill-owner to make *a canal or artificial stream* in such manner as to lead the water into the lands of another person. The remedy, therefore, of the party whose land is thus flowed, is by an action at common law. So, although made in virtue of a contract between the owner of the mill and the owner of the

¹ *Stephens v. Marshall*, 3 Chand. 222.

² *Walker v. Oxford, &c.* 10 Met. 203.

³ *Fuller v. French*, 10 Met. 359.

⁴ *Bryant v. Glidden*, 36 Maine, 36.

⁵ *Murdock v. Stickney*, 8 Cush. 113.

(a) A dam erected below a *steam-mill*, for the purpose of floating timber to the mill, and not for the purpose of driving the machinery of the mill, by which water is ponded back upon the land of another, does not come within the meaning of the act, requiring the proprietor of land overflowed first to apply by petition to the County Court. *Bryan v. Burnett*, 2 Jones, Law, 305.

To entitle a defendant to the process of complaint and take away the common-law remedy, it is necessary that the mill as well as the dam should be in the State. *Wooster v. Great Falls, &c.* 39 Maine, 246.

land.¹ Thus a mill-owner, who erects a reservoir dam on his own land, across a natural stream other than the stream on which his mill is situated, and constructs an artificial channel from the reservoir to his mill-pond, for the purpose of conducting water from the reservoir to his mill, and also to enable him to use the reservoir for the purpose of holding the surplus water of the mill-pond; is liable to an action on the case, for the flowing, thereby occasioned, of the land of another person, situated above the reservoir, on the stream across which the reservoir dam is built.² So an action at common law lies, for damages caused by flowing land, by a dam that has been connected with a mill, if the defendant has abandoned the intention of again using the dam and water as a mill power; and the jury may decide whether he has abandoned such intention.³ So the remedy for a town against a mill-owner, who overflows a road which the town is by law obliged to repair, and does repair, is by an action on the case.⁴ (a) So, upon a statutory complaint, a party cannot recover damages arising from offensive smells proceeding from the flowed land, when the water is drawn off, whereby his contiguous land is rendered less valuable for building lots. The statute affords to a mill-owner no warrant or excuse for causing or continuing a nuisance on his own land or the land of another.⁵ So, the verdict of a sheriff's jury, in a complaint under the statute, having restricted a mill-owner from keeping up his dam, and flowing the land above, certain months in the year, he is liable in an action at common law for flowing the land during those

¹ *Fiske v. Framingham Man. Co.* 12 Pick. 68.

² *Bates v. Weymouth, &c.* 8 Cush. 548.

³ *Hodges v. Hodges*, 5 Met. 205.

⁴ *Andover v. Sutton*, 12 Met. 182.

⁵ *Eames v. New England, &c.* 10 Met. 570.

(a) In such action, the town is entitled to recover the expense incurred in repairing the road, with interest from the time of demanding payment from the mill-owner, but not the costs of an indictment against the town for not seasonably repairing the road.

months; although he causes such flowing through a canal cut by him by the side of the stream, after the verdict, instead of causing the water to flow back in the natural stream, as it flowed before the verdict; and though the flowing was occasioned by a different structure from that which existed at the former trial; and though the new channel was of greater capacity, and would carry off the water more freely and fully from the plaintiff's land, than the old channel, and was kept open during the months specified in the verdict; and since the verdict the defendant had added a large amount of machinery to his mills.¹

20. The right to use running water is *an easement*, and, like other easements, may be acquired as an adverse and exclusive privilege, varying from the natural and original title, by *prescription*. Thus it was formerly held, that, in an action on the case for diverting a watercourse, the *antiquity* of the mill must be set forth. And, if the declaration be for the diverting the water *ab antiquo et solitu cursu*, this amounts to a prescription, which must be proved at the trial, or the plaintiff would be nonsuited.² And it is now held, that twenty years' enjoyment or use of the water of a stream, in a particular manner, gives the right to its continued use in the same mode.³ But the use of the water of a running stream for nine years confers no right.⁴ So, in an action against another for polluting a spring rising in his land and flowing through the plaintiff's, a use by the latter, and those under whom he claims, for twenty years, both supports the right and aggravates the damages for injury to the water.⁵ So, where a mill-owner has in fact exercised the right of keeping up his dam, and *flowing* the land of another person, for twenty years, without payment of damages and without any claim or assertion by the land-owner of the right to damages; it is evidence of a right to flow without payment

¹ Hill v. Sayles, 4 Cush. 549; 12 Met. 142.

² Heblethwaite v. Palmes, 3 Mod. 52.

³ Olney v. Fenner, 2 R. I. 211.

⁴ Steen v. Ashby, 24 Ala. 521.

⁵ Jate v. Parrish, 7 Mon. 325.

of damages, and will be a bar to such a claim.¹ But, as already suggested, the distinction is well established, that, where an action is brought for diverting a stream from a mill, and the plaintiff *prescribes* for a watercourse, there he must show that the mill was an ancient mill; but where the stream is his own, and he claims it as flowing over his own land, there he may maintain an action without showing that it was from an ancient mill.² And it is to be further observed, that, although by usage one may acquire a right to use the water in a manner not justified by his natural right, such acquired right has no operation against the natural rights of a land-owner higher up the stream, unless the user by which it was acquired affects the use that the latter has made of the stream, or his power to use it, so as to raise the presumption of a grant, and render the tenement above a servient tenement.³ In other words, a right to flow the lands of another, founded upon an exclusive and uninterrupted enjoyment for twenty years, cannot be acquired, unless the enjoyment be *adverse*. The uninterrupted enjoyment is *prima facie* evidence that it is adverse, but such conclusion may be rebutted by proof, that it was commenced and continued *without claim of right*.⁴ (a) Hence, in an action for flowing lands, the defendant must allege in his plea, not only that the use was uninterrupted, but that it was adverse.⁵ So it has

¹ Williams v. Nelson, 23 Pick. 141.

² Palms v. Heblethwaite, Skin. 65.

³ Sampson v. Hoddinott, 19 Com. B. 590.

⁴ Hart v. Vose, 19 Wend. 365; Felton v. Simpson, 11 Ired. 84. See Davis v. Brigham, 29 Maine, 391.

⁵ Colvin v. Burnet, 17 Wend. 564.

(a) The plaintiff erected a mill in 1799, and the defendant, who owned a mill lower down on the same stream, was in the habit of raising his dam by means of flash boards, when the water in the stream was low, but, within twenty years after the erection of the plaintiff's mill, had been frequently ordered to take down the flash boards, and always acquiesced, claiming no right to keep them up to the injury of the plaintiff; and afterwards admitted that he had no right to keep them up. Held, this evidence was sufficient to defeat any claim of prescription on the part of the defendant, or to rebut the presumption of a grant. Sumner v. Tileston, 7 Pick. 198.

been held, that a right by prescription to flow land to a given height, by means of a mill-dam, cannot be sustained, unless the flowing *had caused damage* to the owner of the land.¹ And that the owner of a dam does not begin to gain a prescriptive right to maintain such dam, until damage accrues from maintaining it.² So, that there must have been *an actual occupation* of the flow of water upon the land above; not merely an uninterrupted flow through such land.³ And also an occupation *by the defendant*, or those under whom he claims.⁴ And, with reference to the rights of an owner *above* the party claiming by prescription, it has been held, that the constant use by a riparian proprietor, for fifty years, of the waters of a stream for the purposes of a mill, does not deprive a riparian proprietor above of the right to make a reasonable use of the waters of the stream for like purposes, although he thereby necessarily disturbs the natural flow of the water to the lower mill.⁵

21. The use of a watercourse, in order to be justified by prescription, must be *reasonable*, for the party's own benefit or convenience, not malicious, or uncertain.⁶ And further, it must be substantially the same with that to which the prescription applies. The flow must remain the same as to quantity and rapidity.⁷ Thus, in an action for diverting a watercourse, it was held, that, if one has ancient pits in his lands, which are replenished by a rivulet, he may cleanse them, but cannot change or enlarge them.⁸ So where a grant to flow land of an adjoining owner depends on presumption, the extent of the grant is measured by the extent of land actually flooded, and not by the height of the dam. And, if repairs to a dam flood the land, to a greater extent than it has been flooded for a period of twenty-one years, the owner is liable, though the dam may not have been made

¹ *Wentworth v. Sanford, &c.* 33 Maine, 547.

² *Burleigh v. Lumbert*, 34 Maine, 322.

³ *Hoy v. Sterrett*, 2 Watts, 327.

⁴ *Benson v. Soule*, 32 Maine, 39.

⁵ *Thurber v. Martin*, 2 Gray, 394.

⁶ *Twiss v. Baldwin*, 9 Conn. 291.

⁷ See *Ford v. Whitlock*, 1 Williams, 265.

⁸ *Darlington v. Painter*, 7 Barr, 473.

⁹ *Wolferstan v. Bishop, &c.* 2 Wils. 174; *S. P. Brown v. Best*, 1 Wils. 174.

any higher.¹ So one cannot justify the use of a lath-mill under a prescription for a saw-mill.² So, where the defence to an action for the obstruction of a watercourse, by the erection of a dam below the plaintiff's works, and thereby setting the water back upon them, was a right in the defendant, acquired by prescription, to raise the water in the manner and to the height complained of; and it appeared that the defendant at first erected a temporary wooden dam, by which the water was raised to that height; but he afterwards, for his convenience in erecting a permanent stone dam, discharged the water, for some time, through a waste-way, in consequence of which the water was so lowered as not to flow up to the plaintiff's works; and then, when the permanent dam was completed, the water was raised again by means thereof, to the height complained of, and was so continued: it was held, that the period of user, by virtue of which the prescriptive right claimed by the defendant could be acquired, did not commence until the water was permanently raised, by the stone dam, after its completion.³ So where the defendants had, for thirty years or more, used the water from a river, and built a dam across it, and taken the water by an artificial channel, for several rods by the side and within the limits of the highway; and rebuilt said dam, and constructed one of stone, higher and tighter than any dam previously built; and damages resulted from its use to the highway, which were unknown before the construction of the stone dam: it was held, that, as the water had been used, after the erection of the stone dam, but a short time, there was no ground to presume a grant from the town to use the water, as it had been used from the erection of that dam until the suit was brought.⁴ (a) But, in many cases, the

¹ *Mertz v. Dorney*, 25 Penn. 519.

⁴ *Shrewsbury v. Brown*, 25 Verm.

² *Simpson v. Seaneey*, 8 Greenl. 138. 197.

³ *Branch v. Doane*, 18 Conn. 233.

(a) To an action for polluting a stream, and impregnating it with noxious

rule, as to the precise identity of the use with the prescription, has been less rigidly enforced. It is said, "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment,—the making straight a crooked line or footpath would have this result."¹ "The owner is not bound to use the water in the same precise manner, or apply it to the same mill; if he were, that would stop all improvements in machinery."² Thus the occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for twenty years; and therefore it was held to be no defence to such an action, that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging

¹ Per Tindal, C. J., *Hall v. Swift*, 6 Scott, 167.

² Per Abbott, J., *Saunders v. Newman*, 1 Barn. & Ald. 258.

substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fellmonger, and returning it polluted to the stream when so used, and also a prescriptive right for twenty and forty years, respectively. The plaintiff now assigned "that he sued not only for the grievances in the pleas admitted and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified." At the trial it appeared, that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery premises had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold. Without leaving anything to the jury, the judge ruled, that the defendant was entitled to a verdict on all the issues except the first and second. Held, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence, and that the new assignment was well pleaded. *Moore v. Webb*, 19 Com. B. 673.

it to be an ancient mill.¹ So a prescription is valid, though the dam has not through the whole period been maintained upon the same spot, if it has been upon one mill-site.² And it is held, that, although the height, to which an owner below may raise the water, must be measured by the use; the time for which he may keep it up is not thus limited.³ And that a prescriptive right may be acquired to the flow of the water in a particular, artificial channel, even though it is neither actually used, nor necessary for the mill erected.⁴ So, where a mill-owner has acquired a prescriptive right to keep up a dam constantly, which, in its usual operation, would raise the water to a certain height; although, from the leaky condition of the dam, or the rude construction of the machinery in his mill, or the lavish use of the stream, the water has not been usually and constantly kept up to such height, yet, if he repair the dam, without so changing it as to raise the water higher than the old dam, when tight, would raise it, or if he use the water in a different manner and thereby keep up the water more constantly than before; this is not a new use of the stream, for which a land-owner can claim damages, but is a use conformable to the mill-owner's prescriptive right.⁵ So, in case of the change of one ancient pond into three new ones, it is said, "the use of the old pond was discontinued, only because the plaintiff obtained the same or a greater advantage, from the use of the three new ones. He did not thereby abandon his right, he only exercised it in a different spot; and a substitution of that nature is not an abandonment. The declaration means no more than this, that the plaintiff has a right to the overflow of water, either in one pond or in three ponds."⁶ So the owner of one mill privilege brought an

¹ *Saunders v. Newman*, 1 Barn. & Ald. 258. See *Hurd v. Curtis*, 7 Met. 94; *Adams v. Warren*, 23 Verm. 395; *Olmsted v. Loomis*, 6 Barb. 152; *Cromwell v. Selden*, 3 Comst. 253.

² *Stackpole v. Curtis*, 32 Maine, 383.

³ *Alder v. Savill*, 5 Taun. 454.

⁴ *Tyler v. Wilkinson*, 4 Mas. 405.

⁵ *Cowell v. Thayer*, 5 Met. 253.

⁶ *Per Park, B., Hale v. Oldroyd*, 14 M. & W. 789.

action against the owner of another below him, on the same stream, for an injury to his privilege, caused by the defendant's erecting a new dam higher than his old one. On the trial, the Court instructed the jury, that, if the plaintiff's wheels had not been obstructed within twenty years before, as since the erection of the new dam of the defendant, and if such obstruction was caused by the defendant's dam, then the law was for the plaintiff. Held, that the instruction was erroneous, as the fact, that the plaintiff's wheels were obstructed more after the erection of the new dam than before, was not conclusive of the question, whether the new dam exceeded the height of the defendant's old dam, especially where it appeared in evidence that other causes existed, other than the height of the dam, to raise the water higher than before.¹ So the acquisition of a right to flow for one purpose—as for working mills, is not prevented or defeated by the existence, at the same time, of the right in another person to flow for another purpose—as for floating timber.² And where one, having by deed a right to maintain a dam and use a watercourse for irrigation, uses it more than twenty-one years for the further purpose of watering cattle; he acquires a right by prescription to the latter use.³ And where the plaintiffs had for more than twenty years, by means of a canal, adversely diverted and used the water of a stream, subject to a reservation, in favor of the owners of the meadow through which the canal was cut, of the right to turn the water down the natural channel, for six weeks in each year, for the purpose of getting hay more conveniently, and digging clay; it was held, that such reservation did not prevent the plaintiffs from acquiring the right to divert the water, by an actual use and diversion, substantially general and continuous; but operated only as a limitation of the right acquired.⁴

¹ *Manier v. Myers*, 6 B. Mon. 132.

² *Davis v. Brigham*, 29 Maine, 391.

³ *Wheatley v. Chrisman*, 24 Penn. 298.

⁴ *Bolivar, &c. v. Neponset, Man. Co.*

16 Pick. 241.

22. While long-continued use may establish a title, such title may be lost by *disuse* or *abandonment*. It is held, that the owner of a mill privilege on which a mill has formerly stood, but on which no mill is actually standing, is entitled to an action against one who, by erecting a dam below, renders the site useless for the purpose of erecting a mill; unless the owner has abandoned it evidently with an intent to leave it unoccupied.¹ And that where a mill-owner has acquired a right to flow the land of another without payment of damages; the mere non-user of the mill for a period less than twenty years is not alone sufficient evidence of an abandonment of such right.² So it is held, that a mere non-user, by a riparian proprietor, of his full water privileges for twenty years, does not deprive him of the right to use them; there must have been a use by another, adverse to this right, for the whole of such a period, to destroy the right.³ But it is the prevailing rule that, if the owner of a mill-privilege ceases to use the same for an unreasonable length of time, the privilege is thereby lost; and the entire and continued disuse of such privilege for twenty years is strong *prima facie* evidence of a non-user for an unreasonable length of time, and, unless rebutted by clear and satisfactory proof, is conclusive.⁴ So an express declaration by the owner of a mill privilege, that it is no longer his intention to keep up the mill, accompanied with corresponding acts, such as removing the dam and mill, giving notice of such intention to those whose lands he has flowed, and to whom he has paid damages, and the like, will be deemed an abandonment and extinguishment of the privilege.⁵ And the proprietor of a dam, having represented that he intended to abandon it for mill purposes, is estopped to deny that such was his intent, as against one who has been influenced by his representations to build a dam below, which flows back

¹ Hatch v. Dwight, 17 Mass. 289.

⁴ French v. Braintree, &c. 23 Pick.

² Williams v. Nelson, 23 Pick. 141. 216.

³ Townsend v. McDonald, 2 Kern. 381.

⁵ Ibid.

upon the dam above.¹ So a right to maintain a dam, unimpeded by any dam below on the stream, may be lost by non-user, and a non-user for twenty years furnishes presumptive evidence of an extinction of the right by abandonment; although such presumption may be rebutted by proof. And, though twenty years have not elapsed after a mill privilege and dam have ceased to be used as such, when a new dam is erected below, in such a situation as to overflow and destroy the privilege above; if the owner of the latter make no objection to the execution of such new dam during the twenty years from the destruction of his dam, he may be presumed to have abandoned his privilege. And the acceptance, within twenty years, of a deed granting a mill-site, and reciting the existence of another mill-site above it, does not estop the grantee to assert the abandonment by non-user of the upper site, unless the deed shows that the upper site had a right of priority in the use of the water.² So, when a mill is disused and removed and not replaced, the dam ceases to be a mill-dam under the protection of the mill acts, and the remedy for the owner of land which is flowed by it is an action at common law. In such case, the plaintiff can recover only for the injury caused by the dam since it ceased to be under the protection of the mill acts.³ (a)

23. As in other cases of nuisance, in addition to the ordinary remedy of an action on the case, a party injured may sometimes resort to a bill in equity. Thus equity

¹ *Mowry v. Sheldon*, 2 R. I. 369.

² *Baird v. Hunter*, 12 Pick. 556.

³ *Farrar v. Cooper*, 34 Maine, 394.

(a) Where a mill-owner, who has a grant of a right to flow certain lands, suffers his mill and dam to go to decay, and ceases to flow the land, and a highway is then made across the land; he cannot, by afterwards granting his mill privilege and right to flow, authorize his grantee to overflow such highway by means of a new mill-dam on the site of the old one; and his grantee, if he so overflow the highway, is punishable for a nuisance. *Commonwealth v. Fisher*, 6 Met. 433.

will entertain a bill for injunction by a riparian proprietor, whose title is clear, to restrain the diversion of water from his mill, without requiring him first to establish his right at law; on the ground that he cannot obtain full reparation in an action at law for damages, and that the injury may involve the necessity of a multiplicity of suits.¹ So the Maryland high court of chancery has power to prohibit by injunction the obstruction of watercourses, the diversion of streams from mills, the back flowage upon them, and injuries of the like kind, which, from their nature, cannot be adequately compensated by damages at law.² But it is also held, that a court of equity will not, at the suit of an individual, interpose an injunction to prevent the erection of an embankment across a stream, or other obstruction thereto, not amounting to a public nuisance.³ So an injunction was refused, where one owner of a water privilege alleged that another was using more than his share of the water, on the ground that the right had not been determined at law, and that a remedy existed by action.⁴ (a) And where the remedy at law is complete and adequate, an injunction will not be granted.⁵

24. As in other cases of nuisance, the proprietor of a watercourse may sometimes resort to the remedy of *abatement* by his own act. Thus one owning an ancient mill may lawfully go upon the land of another, and remove an obstruction erected across the stream, for the purpose of irrigating the land, by which the mill is prevented from

¹ *Burden v. Stein*, 27 Ala. 104.

⁴ *Jordan v. Woodward*, 38 Maine,

² *Lamborn v. The Covington Co.* 2 Md. Ch. Decis. 409.

⁵ *Winnipiseogee, &c. v. Worster*, 9

³ *Gilbert v. Morris, &c.* 4 Halst. Ch. Fost. 433. 495.

(a) A bill in equity will not lie on behalf of a mill-owner, to restrain a riparian proprietor, bordering upon a pond above, on the same mill stream, from *cutting ice* in such pond, the rights of the parties not having been determined at law. *Cummings v. Barrett*, 10 Cush. 186.

working.¹ So, where one is the owner of an ancient mill, to which there has been attached a raceway, being an artificial canal for conducting off the water, and without the free and unobstructed current of which the mill could not be worked; and such canal has, from time immemorial, passed through the land of another; and there is no grant or contract regulating the rights of the parties: the owner of the mill has a right to enter upon the land through which the raceway passes, and to clear out the obstructions therefrom in the mode, if any, hitherto practised for clearing out the raceway; otherwise, in the usual and ordinary mode of cleansing such canals, doing no unnecessary damage. And the right or duty of the mill-owner, in cleansing such raceway, to place on the adjoining banks, or to carry off, the materials taken out, may depend on the nature of the materials and other circumstances in the particular case.² But a claim of a right to enter upon the land of another, to repair a mill-dam and embankment necessary to the working of a mill, and originally erected with the consent of the owner of the soil, cannot be maintained, but by showing a grant or prescription.³ And where a party claiming by prescription merely uses his prescriptive right in excess; the proprietor injured thereby can justify only an abatement or removal of the unauthorized part of the obstruction. Thus the plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors. The defendant, who had rights on the same stream, removed the stakes and board. Held, that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights.⁴ And, in

¹ Colburn v. Richards, 13 Mass. 420;
Hodges v. Raymond, 9 Mass. 316.

² Prescott v. White, 21 Pick. 341.

³ Cook v. Stearns, 11 Mass. 533.

⁴ Greenslade v. Halliday, 6 Bing.
379. Acc. Moffett v. Brewer, 1 Iowa,
348.

general, in abating an obstruction to a watercourse, a party must proceed in a reasonable manner; with reference to the damage thereby occasioned, though not necessarily in the manner most convenient to the other party.¹

25. With reference to *the parties*, by and against whom legal proceedings may be instituted in relation to watercourses; it is held that the general rule as to diversion applies to *the government* and its grantees, as well as to individuals.²

26. As in other cases of nuisance, the party obstructing a watercourse, as by erecting a dam, or making it higher and lighter than it had been, so that it overflows the plaintiff's land, is not exonerated, by conveying the land to another, more especially if with warranty, from damages arising therefrom after the conveyance. Nor is he entitled to notice to abate before action brought.³ But a purchaser of mills is not liable for continuing a nuisance, which was commenced by his grantor, until after notice and request to remove.⁴ (a)

27. The grantee of land, having a mill and dam erected thereon, who has given his grantor a bond of defeasance which is not recorded, is the owner of such mill and dam, and liable to a complaint for flowing.⁵ So also the lessor for years of a dam, which is used to raise a head of water to drive a mill subsequently erected by the lessee, and who retains an interest in the water raised by the dam.⁶

28. An action on the case for flowing is *local*, and must

¹ Great Falls Co. v. Worster, 15 N. H. 412.

² Hendricks v. Johnson, 6 Port. 472.

³ Curtice v. Thompson, 19 N. H. 471; Waggoner v. Jermaine, 3 Denio, 306; Branch v. Doane, 17 Conn. 402.

⁴ Snow v. Cowles, 2 Fost. 296; Woodman v. Tufts, 9 N. H. 88.

⁵ Hennessey v. Andrews, 6 Cush. 170.

⁶ Sampson v. Bradford, 6 Cush. 303.

(a) A purchaser of a mill-dam, so constructed as to divert the water when the gates are closed, will be liable, without notice, for diverting the water by keeping the gates closed, if his grantor has kept the gates open. 2 Fost. 296.

be brought in the county where the land lies. Thus, where the plaintiff's land was situated in one county, and the defendant's dam, which caused it to be flowed, was erected in another county, an action cannot be brought in the latter county.¹ But where, in an action on the case for damage to the plaintiff's mill, situated in the county where the action was brought, occasioned by a dam erected by the defendants on the same stream, and alleged under a *vide licet* to be in the same county, the proof was, that the dam was in another county; held, the variance was immaterial.²

¹ *Worster v. Winnipiseogee, &c.* 5 Fost. 525.

² *Thompson v. Crocker*, 9 Pick. 59.

CHAPTER XIII.

NUISANCE.—INJURIES TO ANCIENT LIGHTS, AND OTHER PRIVILEGES CONNECTED WITH BUILDINGS.

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| 1. Lights, lawful obstruction of. | 8. Notice. |
| 4. Ancient lights. | 9. Doctrine in the United States. |
| 5. Obstruction by a grantor. | 10. Bill in equity. |
| 6. What is an illegal obstruction of lights. | 11. Parties. |
| 7. Abandonment. | 12. Right of support of soil and buildings. |

1. ANOTHER important incorporeal right, an injury to which falls under the head of nuisance, is that of *lights*.

2. Lights are said to be "a necessary and essential part of the house;"¹ and the law has established definite rules both for the protection and limitation of this valuable privilege.²

3. The owner of a house has a right to make as many windows as he may see fit, although by so doing he may destroy the privacy of his neighbors.³ The opening of such windows is not actionable, but the remedy is by obstructing them, which may lawfully be done:⁴ so if the lights be not ancient, or if the neighbor has not acquired a right by grant, occupation and acquiescence.⁵ And the motive for creating such obstruction is immaterial.⁶

4. But where a house has lights which have existed twenty years, or *ancient lights*; the erection of another which obstructs them is ground of action or injunction.⁷

¹ *Palmer v. Fletcher*, 1 Lev. 122.

² 2 Hill. Real Prop. 75. See *Truscott v. Merchant, &c.* 36 Eng. L. & Eq. 467.

³ Bacon's Abr., Actions, B; 2 Bouv. L. D. 653.

⁴ 3 Camp. 82; *Mahan v. Brown*, 13

Wend. 261; *Thurston v. Hancock*, 12 Mass. 220.

⁵ *Mahan v. Brown*, 13 Wend. 261.

⁶ *Pickard v. Collins*, 23 Barb. 444.

⁷ *Wright v. Freeman*, 5 Harr. & J. 477; 1 Leon. 188; Cro. Eliz. 118; 2 Rolle's Abr. 140 l. *Nusans* G. 10; 9 Co. 58.

7 The formal allegation in a suit for the obstruction of lights is said to be, that the house was an ancient house, wherein were ancient windows through which the light had entered, and had been used to enter, from time immemorial.¹ But the modern rule is, that, although it is not alleged that the house is an ancient one, or that the plaintiff is entitled by prescription to the easement, he may prove an ancient right, if necessary to his case.² But where one, having a privilege of light through ancient windows, enlarges such windows, he gains no new right, and has no remedy for an obstruction of the ancient lights, which is a necessary consequence of an erection that obstructs the new ones.³ (a)

5. In addition to the general right to lights, acquired by prescription or long-continued use, is another right of similar nature, depending rather upon estoppel. If one owning a house and adjoining land sell the former, he cannot *in derogation of his grant* erect upon the latter any building which will obstruct the lights of the house. It is said, the house was granted "with all the easements and delights belonging to it."⁴ And the principle applies as well to a subsequent purchaser of the adjoining land from the vendor of the house, as to such vendor himself.⁵ And if the house and adjoining land are sold at the same time to the plaintiff and defendant, respectively, the former "with all the lights," &c., and described as bounded by a piece of *building-ground*, the de-

¹ 2 Selw. N. P. 1108. See *Winship v. Hudspeth*, 10 Exch. 5.

² *Story v. Odin*, 12 Mass. 157; *Gerber v. Grabel*, 16 Ill. 217.

³ *Renshaw v. Bean*, 10 Eng. L. & Eq. 417.

⁴ *Palmer v. Fletcher*, 1 Lev. 122; *Story v. Odin*, 12 Mass. 157; *Cox v. Matthews*, 1 Ventr. 237; *Compton v. Richards*, 1 Price, 27.

⁵ 1 Lev. 122.

(a). By stat. 2 & 3 Wm. IV. c. 71, twenty years' use gives a title to lights, unless there be an interruption of one year. *Flight v. Thomas*, 11 Ad. & Ell. 688.

So, although by the verbal permission of a third person. *Corporn. v. Pewterer*, 2 Moo. & R. 409. See *Salter's, &c. v. Jay*, 3 Ad. & Ell. N. S. 109; *Plasterers, &c. v. Parish, &c.* 6 Eng. L. & Eq. 481.

fendant can lawfully erect only such a building as had previously stood upon the land, though removed prior to the sale; not a higher building, and creating a greater obstruction of the lights.¹ (a) But where A. was party to a deed, which conveyed to B. a house with windows, adjoining land of A., and by this deed A. conveyed a part of this adjoining land to B.; and he also witnessed without objection the erection of the house; held, A. might still obstruct B.'s windows.² And where one conveys a tenement adjoining his own, with a stipulation, that, if the grantee shall alter the buildings or erect new ones, he shall not build nearer than a certain line to the tenement of the grantor, but prescribing no limit as to height; the grantee may lawfully increase the height of his building, though he thereby obstructs the grantor's lights.³

6. Total deprivation of light is not necessary to sustain an action, but only some sensible diminution of light and air, or the free and ample use of it,⁴ (see p. 151). And it is immaterial whether the lights are at the extremity of the plaintiff's premises or not.⁵ But no action can be maintained, unless by the obstruction the value of the property is injured. The loss of a look-out or prospect, or the mere taking off of a ray or two, is not sufficient. But, as affecting the degree of obstruction,

¹ Swansborough v. Coventry, 9 Bing. 305.

² Blanchard v. Bridges, 5 Nev. & M. 567.

³ Atkins v. Bordman, 2 Met. 457.

⁴ 4 Esp. 69.

⁵ Cross v. Lewis, 2 B. & C. 686.

(a) A parol agreement was made, by the proprietors of the lots on one side of a street in the city of New York, that the houses to be erected thereon should be set back eight feet from the line of the street, so as to leave a court-yard of that depth in front of each house; and in pursuance of such agreement a row of large and expensive houses, extending the entire length of the street, was erected and placed back eight feet. Held, that each house and lot was, with respect to others, a servient tenement to the extent of the court-yard; and therefore a subsequent grantee of one of the lots was properly restrained by injunction, from building on the space so agreed to be left open. *Tallmadge v. The East River Bank*, 2 Duer, 614.

the change of angle at which the light enters is a proper subject of evidence.¹

7. The right to light is acquired by *enjoyment*, and may be lost by a discontinuance of the enjoyment, unless the party at the same time does some act to show an intention of resuming it within a reasonable time. It is said, "Suppose a person to be the owner of a house with ancient lights, which no person has a right to obstruct. If he erect a house, or put up a wall, directly covering his windows, has he not extinguished his light as effectually as if he had blown out his candle?"² Thus the plaintiff's messuage was an ancient house, adjoining which there had formerly been a building, having an ancient window next the lands of the defendant. The former owner of the plaintiff's premises, about seventeen years before, had pulled down this building, and erected on its site another with a blank wall, next adjoining the premises of the defendant; who, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff. The plaintiff then opened a window in that wall, in the same place where the ancient window had been in the old building; which the defendant obstructed. Held, an action would not lie.³ So the privilege of lights may be lost, by a change in the mode or form of using them, which is prejudicial to the adjoining owner, as by altering the nature and use of the building, and changing mere openings into windows.⁴

8. The use of lights does not bind the adjoining owner, unless he had knowledge of their existence. And the occupation of his land by a tenant is no sufficient ground for implying such knowledge.⁵ Hence, where lights have been put out and enjoyed without interruption for above twenty years, during the occupation of the opposite premises by a

¹ *Pringle v. Wernham*, 7 C. & P. 377; *Wells v. Ody*, *Ib.* 410; *Parker v. Smith*, 5 *Ib.* 438. See *Embrey v. Owen*, 4 Eng. L. & Eq. 466.

² Per Nott, J., *Taylor v. Hampton*, 4 M'C. 96.

³ *Moore v. Rawson*, 3 B. & C. 332.

⁴ *Garritt v. Sharp*, 3 Ad. & Ell. 325.

⁵ *Daniel v. North*, 11 E. 372. See *Bradbury v. Grimsell*, 2 Wms. Saun. 175 d. e.

tenant; that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant, in possession under such landlord, from building up against such encroaching lights.¹ And, inasmuch as the title derived from use or occupancy depends upon a presumed grant, such title will not arise, where under the circumstances no grant could be made. Thus, where lights had been enjoyed for more than twenty years, contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under St. 55 Geo. III. c. 147; it was held, that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed.² (But strict proof of notice will not be required, in order to establish a title from long-continued use of the lights. Thus the plaintiff and defendant had premises adjoining each other; the plaintiff's house being about four feet within the boundary of her premises. For thirty-eight years there had been windows looking towards the adjoining premises; but, for a long series of years before the defendant purchased them, those premises had belonged to a family living at a distance, and it was not proved that any member of that family had ever seen them, and they had been occupied by the same tenant for the last twenty years. About two years before action brought, the defendant purchased them and built a house, thereby darkening the plaintiff's rooms. Held, the plaintiff was entitled to recover.³ And it is held that, where the servitude of light in favor of an adjoining estate is *apparent*, and necessary for the use and occupation of the dwelling, the purchaser of the neighboring lot will be held to have known of its existence, and take and hold subject thereto.⁴

¹ Daniel v. North, 11 E. 372.

² Barker v. Richardson, 4 Barn. & Ald. 579.

³ Cross v. Lewis, 2 B. & C. 686.

⁴ Durell v. Boisblanc, 1 La. Ann. R. 407.

9. In the United States, the qualifications of the title to ancient lights have been so strictly applied, as in great measure to neutralize the rule itself. [Thus it is held in New York, that the doctrine of presumption of right by grant or otherwise, as regards the windows of one person overlooking the land of another, so that, by an uninterrupted enjoyment for twenty years, the owner acquires a right of action against his neighbor for stopping the lights by the erection of a building upon his own land; forms no part of our law, not being adapted to the circumstances or existing state of things in this country. Such question of presumption must be submitted to the jury; and the judge is not justified in telling them that they must, but should inform them that they may, presume a grant; except in a plain case where there is no evidence to repel the presumption.¹] So it is held in Maine, that a person may legally erect a building on his own land, immediately adjoining the land of another, and put out windows overlooking the latter; and although he use them for twenty years, he will have no right of action for the obstruction of them.²) So in Massachusetts it has been recently decided, that no action lies against the owner of land in a city, for erecting a wall thereupon, which obstructs the access of light and air, as it has uninterruptedly existed for twenty years, to windows in the cellar and lower story in a building ten feet within the boundary line of the plaintiff, unless the windows are thereby substantially deprived of light. It is said, "The general rule of the common law, before it was regulated by statute, seems to have been—that uninterrupted enjoyment of air laterally, through and over the land of another, and enjoyed a length of time, created an easement, which could not be disturbed, like that of a right of way, or aqueduct or drain in and over the land of another; though these are distinct in their nature, consisting in actual use and qualified right of occupation in and upon the real property of another, and where such occupation is open

¹ *Parker v. Foots*, 19 Wend. 309.

² *Pierre v. Fernald*, 26 Maine, 436.

and visible, and manifestly adverse.—But even this general law of England was somewhat modified in regard to the densely packed tenements of the largest city in the kingdom, by the custom of London. In many of the States of the Union it has been held, “that the enjoyment of light and air in a messuage or building, received through windows laterally, over the vacant territory or lower building of an adjoining proprietor, gives to the owner of such building no right to the continuance of such enjoyment. We think the rule is well settled, that, in a city tenement, an easement for light and air, derived from use and enjoyment, or implied grant, can only extend to a reasonable distance, so as to give to the tenement entitled to it such amount of air and light as is reasonably necessary to the comfortable and useful occupation of the tenement for the purposes of habitation or business; not the amount which, under some circumstances, would be agreeable and pleasant, nor the full amount which the tenement has been accustomed to receive; but the amount reasonably necessary, (see p. 147). The distance will be determined by a just regard to usage, to the habit and mode of building at the place, a just regard to the rights of ownership of real estate, and, generally, the circumstances of the case. In cities closely built and crowded with inhabitants, the limits must be obviously narrower than in rural districts.—The question of reasonableness is a mixed one of fact and law; and where all the facts and circumstances appear, it is a question of law, but in practice it is a question to be passed upon by the jury, under the direction of the Court in matters of law.”¹ And a still more recent case is said to decide, that, in order to establish a prescriptive right, there must be proof of *adverse enjoyment*; that is, under a claim of right, with the knowledge and not by permission of the adjoining owner.² So, in New Jersey, an injunction will not be granted, to prevent the defendant from building so as to shut up a window, alleged

¹ Per Shaw, C. J., *Fifty Associates v. Tudor*, 6 Gray, 259–60.

² *Rogers v. Sawin*, Law Rep. June, 1858, p. 105, Mass. Sup. Jud. Court.

to be ancient, in the gable-end of the complainant's house, the complainant's house being built on the line of his lot adjoining the defendant's.¹ And the rule above stated, that one cannot obstruct the lights of an adjoining owner in derogation of his own grant, is not adopted in New York.²

10. As in other cases of nuisance, a bill in equity may sometimes be maintained for the obstruction of lights. But it is held that no injunction lies against a lessee's obstructing lights in the house leased, unless the injury would be irreparable or incapable of compensation.³ Nor a perpetual injunction, in case of a disputed title, until the question has been settled at law.⁴

11. In reference to the *parties* to a suit for the obstruction of lights, it is held that the owner of a house, although not in possession, may maintain an action upon the case for stopping up the windows.⁵ So, on the other hand, a tenant may maintain an action against the landlord for obstructing lights. But damages can only be given for the time which had elapsed when the suit was commenced; not for the whole term.⁶

12. Another important topic, connected with buildings, is the right of one owner to take down his building and excavate the soil, or to do the latter act alone; thereby affecting the soil or building of an adjacent owner. In an ancient case, the plaintiff declared, that he was seized of a dwelling-house, *lately built*, and that the defendant had a house next adjoining, and, in making a cellar under the latter house, the defendant dug so near the foundation of the plaintiff's house, that he undermined it, and one half of it fell; and judgment was rendered for the plaintiff.⁷ The authority of this case, however, has been questioned.⁸ And the prevailing doctrine now is, that a person building a house contiguous to, and adjoining the house of another, may lawfully

¹ King v. Miller, 4 Halst. Ch. 559.

² Myers v. Garmel, 10 Barb. 537.

³ Atkins v. Chilson, 7 Met. 398.

⁴ Irvin v. Dixon, 9 How. 10.

⁵ Thomlinson v. Brown, Sayer, 216.

⁶ Blunt v. McCormick, 3 Denio, 283.

⁷ Slingsby v. Barnard, 1 Rolle, R. 88.

⁸ 12 Mass. 227.

sink the foundation of his house below that of his neighbor's, and is not liable for any consequential damage, provided he used due care and diligence to prevent injury.¹ It is said, "One land-owner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus he cannot, by building a house near the margin of his land, prevent his neighbor from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what, in the Roman law, was called a servitude."² But a distinction is made between an injury to a house built upon the land, and an injury to the soil itself. It is held, that the owner of land adjacent to land of another, has no right to remove the earth, and thus withdraw the natural support of his neighbor's soil; and if he does, is liable for damages, and will be restrained by injunction. But this doctrine is strictly confined to those cases, in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil.³ Thus, where one built a house on his own land within two feet of the boundary line, and, ten years afterwards, the owner of the land adjoining dug so deep into his own land as to endanger the house; and the owner of the house, on that account, left it and took it down; held, no action lay for the damage done to the house, but only for the damages arising from the falling of the natural soil into the pit so dug.⁴ So, where a declaration stated, that A. was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B., and that B. dug into the soil and foundation of the last-mentioned house so negligently, and so near to the plaintiff's house, that the wall of the latter house gave way; on demurrer to so much of the declaration as alleged the

¹ *Panton v. Holland*, 19 Johns. 92.

Contra, *Smith v. Kenrick*, 7 Com. B.

² *Smith v. Kenrick*, 7 Com. B. 565-6. 515.

³ *Farrand v. Marshall*, 19 Barb. 380;

⁴ *Thurston v. Hancock*, 12 Mass. 220. *Humphries v. Brogden*, 12 Q. B. 739.

digging so near, &c., the defendant had judgment. But, if it had appeared that the plaintiff's house was *ancient*, or if the complaint had been, that the digging occasioned a falling in of the soil of the plaintiff, to which no artificial weight had been added; it was doubted whether an action would not have lain.¹ So A. owned a building, the footing of one of the walls of which supported one of the walls of an adjoining house, belonging to B. A., being about to pull down and remove the foundations of his house, notified B. of his intention, and used reasonable and ordinary care in the work, but took no measures to preserve B.'s building, although the nature of the soil required him to lay the new foundation several feet deeper than the old. Held, A. was not liable for an injury hereby caused to B.'s house.² So the owner of a lot, within six feet of Christ's Church, in New York, built more than thirty-eight years before, commenced the erection of a building thereupon, to be six stories high; and was sinking the foundation sixteen feet deep, and ten feet lower than that of the church. The wall of the church, at the corner opposite to which the excavation had been completed, had so settled as to leave a considerable crack. The proprietors of the church filed a bill for injunction, stating these facts, and that the church was in great danger if the work proceeded; but not that the defendant was improving his property in an unreasonable or unusual manner, or with any intention to injure the church, or that the plaintiff had any claim by prescription or grant from the defendant. Upon an application to dissolve the injunction which had been granted, held, although one has a right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, this right does not extend to artificial erections; and the injunction was accordingly dissolved.³

13. But it is to be further remarked, as a qualification of the general rule upon this subject, that while one, who, in

¹ Wyatt v. Harrison, 3 B. & Ad. 871.

² Lasala v. Holbrook, 4 Paige, 169.

³ Massey v. Goyder, 4 C. & P. 161.

digging a foundation upon his own ground, so weakens the earth, as to induce the fall of the wall of another, is not responsible for the loss, unless it was reasonably certain that such would be the effect of the act, and failed to apprise the other party, that he might use the proper preventives; yet case may be maintained against a person, who by digging away the earth on his own ground, unskilfully, carelessly, and negligently, either causes or accelerates the fall of an adjoining house.¹ (a) Thus, in 1803, the plaintiff's house

¹ *Shrieve v. Stokes*, 8 B. Mon. 453; *Dodd v. Holme*, 3 Nev. & Man. 739; *Trower v. Chadwick*, 3 Bing. N. 334.

(a) Declaration, that the plaintiffs were possessed of a vault adjoining certain walls, and which was of right supported in part by parts of the adjoining walls; that the plaintiffs were of right entitled that their vault should be so supported; and that there were foundations belonging to the vault which the plaintiffs ought to enjoy; yet the defendant wrongfully removed the wall adjoining the plaintiffs' vault, without taking proper precautions to prevent them from giving way, *per quod* the plaintiffs' vault was damaged by the fall of some materials, which otherwise would not have hurt it, and special loss ensued. Held, to disclose a sufficient right of action.

Plea, as to the not taking precautions to support the vault, that the defendant was not bound by law to take such precautions. Held, ill, as offering an issue of law for a jury, and as containing the traverse of a duty not alleged by the plaintiffs. So likewise, for the same reasons, a plea that the defendant was not bound by law to take precautions to prevent the foundations of the vault from being weakened. So a plea that the fall of the materials was not occasioned by any act or default of the defendant, or the neglect of any duty by law cast on him. *Trower v. Chadwick*, 3 Bing. N. 334.

Where one of two persons, having adjacent lands, builds a house at the extremity of his land, and the other afterwards excavates his own soil near to, but without touching the ground so built upon, it has been doubted whether the latter is bound to see that his neighbor's foundations be not thereby weakened; and whether, if they be so, he is guilty of an actionable negligence in having so used his own soil, without protecting that of his neighbor, although no negligence be shown in the mode of carrying on the work. Also, supposing him not liable in the case of a newly-built house; whether he would be so, if the house had stood twenty years before the excavation was made. 1 Ad. & Ell. 493.

was built against the pine end wall of the defendant's house, by permission. In 1829, the defendant made an excavation in a careless and unskilful manner, in his own land, near to the wall, by which he weakened it, and consequently injured the house of the plaintiff. Held, an action on the case was maintainable.¹ So where it is alleged and proved, that the defendant so negligently, unskilfully, and improperly dug his own soil, that the plaintiff's house was thereby injured, an action lies; and, although it be shown that the house was infirm, and could, at all events, have stood only a few months, still the plaintiff may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of the defendant's negligence; and, in determining the question of negligence, the jury ought to consider the state of the plaintiff's house.² But mere *juxtaposition* does not render it necessary, for a person who pulls down his wall, to give notice of his intention to the owner of an adjoining wall. Nor, if he be ignorant of the existence of the adjoining wall,—as where it is underground,—is he bound to use extraordinary caution in pulling down his own.³ And it has been held, upon a declaration for negligence, in pulling down a house adjoining the plaintiff's house, without shoring up the latter, whereby it fell, that the plaintiff cannot recover, without evidence, from which a grant of right to the support of the adjoining house can be inferred. Nor, upon such a declaration, can the plaintiff insist, that the defendant ought to have given notice of his intention to pull down.⁴ So, in case by a reversioner of a house in Cheapside, against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down; held, first, that upon this declaration the plaintiff could not recover, on the ground of the defendant's not

¹ *Brown v. Windsor*, 1 C. & Jer. 20.

² *Dodd v. Holme*, 1 Ad. & Ell. 493.

³ *Chadwick v. Trower*, 6 Bing. N. R. 1; 8 Scott, 1.

⁴ *Perton v. Governors, &c.* 4 M. & Ry. 625.

having given notice that he was about to pull down his house, that not being alleged as a cause of the injury ; secondly, that, as the plaintiff had not alleged any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.¹ (a)

¹ *Peyton v. The Mayor, &c.* 9 B. & C. 725.

(a) Some miscellaneous points may be added, in connection with the right of support, and party-walls.

Trespass does not lie by one part-owner of a party-wall against the other part-owner. *Wiltshire v. Sidford*, 1 M. & Ry. 404; *Cubitt v. Porter*, Ib. 267.

The common user of a wall, separating adjoining lands which belong to different owners, is *primâ facie* evidence that the wall, and the land on which it stands, belong to the owners of the lands, as tenants in common. Hence, where such an ancient wall was pulled down by one of the tenants, with the intention of rebuilding it, and a new wall was built of greater height than the old one, it was held that this was not such a total destruction of the wall, as to entitle one of the tenants to maintain trespass against the other. *Cubitt v. Porter*, 8 B. & Cress. 257.

Upon the subject of party-walls, the following case is reported, though not by formal authority, to have been recently decided in Massachusetts:—

Phillips et al. v. Boardman.—This was a motion by the defendant for the dissolution of an injunction issued in the cause. The parties are owners of adjoining estates on Washington Street, between which there is an ancient party-wall, one foot thick, used by them in common for support of the timbers of their respective buildings. The defendant having taken down his building, and being about to erect a new one, had pared off, to a considerable height, the face of the wall, on his side of it, to the depth of four inches, and was erecting a new wall, a foot thick, which occupies the four inches of the old wall thus removed, and eight inches taken from his own land. In the course of this work, which had reached to the floor of the second story, when the injunction was granted, he had occasionally projected a brick, two inches beyond the face of his new work, so as to reach the centre of the old wall ; partly for what support it might render to the remaining portion of the same, but also and principally for the purpose of indicating the division line as claimed by him, and with the avowed intention of breaking up the joint character of the old wall, and of preventing the complainants from building close to the face of his new wall, if when they should rebuild on their estate, they desired to do so. It appeared

from the report of the Master, to whom the case was sent to take the evidence, that the old wall was an *ancient wall*, still sufficient for the buildings of which it had been the division, and for any buildings such as are commonly built on Washington Street; that by this paring off it was materially diminished in capacity for service, and that the new wall was substantially an independent one, affording no material support to the remaining eight inches of the old wall. The injunction granted to the complainants restrained the defendant from proceeding in his work of thus diminishing the old wall, and his Honor refused to dissolve the same, on the ground that the law is clear, where parties are jointly interested in an ancient party-wall, in a condition to be useful and serviceable, and nothing appears in the origin of the wall to limit or control their rights in it; that neither of them can so deal with it, as to diminish its capacity for service, without the consent of the other, and that this was especially a proper case for the interference of the Court by injunction, because, in addition to the very considerable and irreparable mischief that would be done by the further progress of the defendant, and the difficulty of ascertaining the nature and extent of the damage after the work should be covered in, if the defendant should be allowed to go on and perfect his purpose, of destroying the joint party character of the wall, the complainants would not only be deprived of their present enjoyment of it, as a *party-wall*, but in twenty years, the right itself, if the defendant so long continued his independent wall, would be, without multiplicity of suits, wholly gone.

The principle, that the builder of a new house may take down a party-wall, insufficient for his purposes, and rebuild it at his own expense, is no invasion of the absolute right of property. *Evans v. Jayne*, 23 Penn. 34.

A party-wall built in Kensington district, Philadelphia county, was at first perpendicular, its foundation being equally on land of the plaintiff and the defendant. It afterwards settled, so that it leaned at the top several inches on the side of the defendant. Held, the leaning of the wall did not discharge the defendant from his liability to the plaintiff for one moiety of its value to him, under the act of 1820, incorporating said district; and, as the jury were allowed to deduct the damage to him on account of the encroachment on his premises, the defendant could not complain. *Sauer v. Monroe*, 20 Penn. 219.

If an adjoining owner breaks into a party-wall, erected in such district, without notice to the other party, who was the first builder, he thereby waives his right to choose arbitrators, and having a decision as to the value of the wall by regulators as provided for in said act. *Ibid.*

A., owning two adjoining lots, conveyed one of them to B., authorizing him to build a party-wall on the division line, one half on each lot, and covenanting to pay for the same when used. B. built such wall and erected a dwelling-house thereon, and then conveyed the house and lot

to C. Held, that C., on such wall being used by A.'s subsequent grantee of the other lot, might recover of A, or, in case of his death, of his executors, one half of the value of the wall, and that, C. having died intestate after the use of the wall by A.'s grantee, the action was properly brought by his administrator. *Burlock v. Peck*, 2 Duer, 90.

To an action of trespass for breaking, &c., a wall of the plaintiff's, bounded on the north by a workshop of the defendant, it was pleaded, that the wall was not the wall of the plaintiff, but a party-wall, standing partly on the plaintiff's and partly on the defendant's land; that the roof of the defendant's workshop rested on the top of the wall on the defendant's side, and that the trespass was committed partly on the plaintiff's half of the wall. Held, the action was not maintained, being brought for *the whole wall*; that, even if the party-wall were treated as two walls, the defendant's part was not part of the workshop, and therefore the description in the declaration, with the abutments, embraced the whole wall; and there was a fatal variance. *Murly v. M'Dermott*, 8 Ad. & Ell. 138.

To an action on the case for prostrating part, and building on part, of a wall, and laying materials on a close, in which wall and close the plaintiff was interested as a reversioner, the defendant pleaded that his own dwelling house, which he was repairing, accidentally and without his default, fell upon the wall and threw it down; and that afterwards, and before action brought, and within a reasonable time, the defendant, carefully, and at his own expense, erected and built the said wall upon the said close, and in and about such erecting and building necessarily and unavoidably committed the grievances, &c., doing no unnecessary damage, &c., and thereupon and then, to wit, at the times when, &c., at his own expense, repaired all damages sustained by the plaintiff by reason of the grievances, &c. Held, on demurrer, no answer to the action. *Taylor v. Stendall*, 7 Ad. & Ell. N. S. 634.

Where one raising a party-wall *bonâ fide* intended to comply with the directions of the building act, 14 Geo. III. c. 78, but did not in fact do so, and injured the adjoining house, the owner of which brought trespass; held, that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the one hundredth section. *Pratt v. Hillman*, 4 B. & C. 269.

Some miscellaneous examples may be added of injuries to dwelling-houses.

An action on the case lies for not repairing the partition-wall of a privy, whereby filth ran into the plaintiff's cellar. *Tenant v. Golding*, 1 Salk. 22, 360.

A declaration for causing water to flow through pipes near the foundation of the plaintiff's house, so that the water sapped the foundation of the house, is unexceptionable after verdict, although it does not expressly

state that the pipes were the defendant's, that he laid them there, or that he is bound to repair them. In such action the plaintiff need not set forth his title to his house; it is sufficient for him to show that he was possessed of it. *Hoare v. Dickinson*, 2 Ld. Raym. 1568.

A reversioner may maintain an action against one who erects upon his house eaves and a pipe, overhanging and conducting water upon land occupied by a tenant of the plaintiff. *Tucker v. Newman*, 4 Per. & Dav. 14; 11 Ad. & Ell. 40.

Case lies for building a house which overhangs the land of another, and causes the rain to fall upon and injure it. *Penruddock's case*, 5 Co. 100; *Bowry v. Pope*, 1 Leon. 168.

Or for an erection so situated as to throw water on a roof; without proving any actual instance of such injury. *Fay v. Prentice*, 1 Com. B. 828.

There are some other incorporeal rights relating to lands, which may be the subject of *tort* or wrong, such as *ways, commons, markets, and ferries*. Most of them, however, have given rise to very few decided cases, in reference to the particular point of *actionable injury*; and, with respect to the *right of way*, as it is for the most part set up rather for a defence than a ground of suit, and, moreover, its obstruction is one of the most familiar instances of *nuisance*, strictly so called, it does not require further distinct consideration. (See *Torts and Crimes*, i. 76; *Nuisance*, ii. 72; *Trespass*.)

CHAPTER XIV.

PATENTS, COPYRIGHTS, ETC.

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| <ul style="list-style-type: none"> 1. Nature, definition, and statutory regulations of patents. 3. <i>Novelty and utility</i>, necessary to a patent—<i>novelty</i>. 11. <i>Utility</i>. 12. <i>Practical application</i> necessary. 13. Distinction between a <i>machine</i> and a <i>process</i>. 14. Patent for an <i>improvement</i>. 15. For distinct inventions. 16. For a <i>mode of manufacturing</i>, and the thing manufactured. 17. <i>Joint inventors</i>. 18. Infringement of a patent. 23. <i>Specification</i>. 27. <i>Transfer of a patent</i>. 36. <i>Injunctions</i>. 38. <i>Account</i>. 39. <i>Practice in equity</i>. 43. <i>Damages</i>. | <ul style="list-style-type: none"> 44. <i>Mode of trial, evidence, &c.</i> 47. <i>Miscellaneous points of practice</i>. 53. <i>Copyright, at common law and by statute</i>. 54. <i>Nature and extent of the privilege; how infringed</i>. 55. <i>Abridgments</i>. 56. <i>Translations</i>. 57. <i>Price current</i>. 58. <i>Charts, engravings, &c.</i> 59. <i>Law Reports, marginal notes, dramatic compositions</i>. 60. <i>Mutual rights of authors and publishers</i>. 63. <i>Registration</i>. 64. <i>Assignment</i>. 66. <i>Remedies—injunction, account, penalties, &c.</i> 68. <i>Protection of manuscripts, &c.</i> 69. <i>Trade-marks</i>. |
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1. ANOTHER subject of the wrong termed *nuisance*, is a *patent*; which is an *incorporeal* right, and a violation of which consists of acts in their nature indirectly and consequentially injurious, and is therefore the proper subject of an action on the case, and not of an action of trespass.

2. A patent is a grant by the State of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention.¹ And the following summary view of the general statutory regulations upon the subject is given by Chancellor Kent: "A patent-office is now attached to the department of state, and a commissioner of patents appointed. Applications for patents are to be made in writing to the commissioner, by any person having discovered or invented any new and useful art, machine, manufacture or composition of matter, not known or used by

¹ Phillips on Patents, 2.

others before his discovery or invention thereof, and not at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer. The applicant must deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in full, clear, and exact terms, avoiding unnecessary prolixity, so as to enable any person skilled in the art or science to which it appertains, or is most nearly connected, to make, construct, compound, and use the same; and he must, in the case of a machine, fully explain the principle and the application of it, by which it may be distinguished from other inventions; and he must particularly specify the part, improvement, or combination, which he claims as his own invention or discovery. He must accompany the same with drawings and written references, where the nature of the case admits of drawings, or specimens of ingredients, and of the composition of matter sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter. He must likewise furnish a model, if practicable, and make oath that he believes himself to be the first inventor or discoverer of the art, &c., and does not know or believe that it was ever before known or used; and he must further state of what country he is a citizen." (a) It is further provided that a patent may be taken out,

(a) In reference to the bearing of *citizenship* upon a patent, it is held, that the patent laws were not intended to apply to and govern the structure or equipment of a vessel of a foreign friendly nation, resorting to our ports, by our consent, for purposes of lawful commerce. Where a French vessel was rigged in France, with gaffs which had been patented in the United States, it was held, that, as the gaffs were placed on the vessel when she was built, as part of her original equipment, in a foreign country, by persons not within the jurisdiction of our patent laws, they were not within their application, but exempted. *Brown v. Duchesne*, 2 Curtis, C. C. 371.

In England, the exclusive right under an English patent will be enforced against foreigners while in England, in the same way and to the same extent as it would against British subjects. Therefore, in a case in which the

although one has been already taken in a foreign country. So, by executors and administrators. Patents are also made assignable. It is further provided, that the patentee shall not lose his right, if he believed himself the first inventor, though in fact the invention were previously used in a foreign country, unless patented or described in print.¹

3. In general, *novelty* and *utility* are the two essential elements of a valid patent. Though an instruction to the jury, that, *if there is anything* new and useful described in a patent, it is valid, is held to be erroneous.² The *principle* of a machine means the *modus operandi*, or that which applies, modifies, or combines mechanical powers to produce a certain result; and, so far, a principle, if new in its application to a useful purpose, may be patentable.³ But it is often a question of difficulty, whether one machine operates *upon the same principle* as another, and whether that which is termed an improvement is really new and useful. The material inquiry usually is, not whether the same elements of motion, and in some respects the same mode of operation and component parts are used, but whether the given effect is produced substantially by the same mode of operation and combination of powers. Mere colorable differences or slight improvements will not affect the right of the first inventor.⁴ Whether an invention is new, is a question for the jury.⁵ And presumptive evidence is admissible of a prior use.⁶

¹ 2 Kent, 366-7.

² Holliday v. Rheem, 18 Penn. 465.

³ Barrett v. Hall, 1 Mas. 470; Whittemore v. Cutter, 1 Galli. 478; Woodcock v. Parker, 1b. 438; Boulton v. Bull, 2 H. Bl. 486.

⁴ 2 Kent, 369-70.

⁵ Steiner v. Heald, 6 Eng. L. & Eq.

536.

⁶ Parker v. Ferguson, 1 Blatch. 407.

foreign owners of a ship caused to be made in their own country, and attached to their vessel, a steam screw propeller, the manufacture and use of which was unrestricted by law there, but restricted in England by a patent, and afterwards sent the vessel with a cargo for the purposes of trade to England; the use of the steam propeller was restricted by injunction, while the vessel should be within the waters covered by the English patent. Caldwell v. Van Vliessengen, 9 Eng. L. & Eq. 51.

4. It has been held doubtful, whether a mere change in the mode of fastening knives on a cylinder to be ground, or to fasten one instead of several, is a change in structure from an old machine, sufficient to justify a patent for it.¹

- So the forming of metal screws or shanks, to clay and porcelain knobs for doors and furniture, by pouring metal in a fused state into a dovetail-shaped cavity in the base of the knobs, that mode of fastening the shank to the knob having been previously applied to knobs of wood and metal; is not patentable, although it produce a better or cheaper article than any known before.²

5. The first inventor, who has *reduced his invention first to practice*, and put it to some real and beneficial use, however limited, is entitled to a priority of the patent right, and a subsequent inventor cannot sustain his claim, though he is an original inventor, and has obtained the first patent. If the patentee be not the first or original inventor in reference to all the world, he is not entitled to a patent, even though he had no knowledge of the previous use or previous description of the invention, in any printed publication.³ If the thing claimed has been before made or described in any public work, the discovery is not new, and the patent is consequently void.⁴ But a patent will not be avoided by *experiments* previously made by another, although such experiments led to the invention or discovery.⁵ Whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, although others may have had the idea, and made experiments towards putting it in practice, and although all of the component parts may have been known under a different combination, or used for a different purpose.⁶ Thus, where an invention consists in the application of spiral springs to the churn dash, in such a manner that it may be operated by the foot; evidence that

¹ Hovey v. Stevens, 1 W. & M. 290.

² Hotchkiss v. Greenwood, 11 How. U. S. 248; 4 McLean, 456. See Bush v. Fox, 26 Eng. L. & Eq. 464; Root v. Ball, 4 McLean, 177.

³ 2 Kent, 368.

⁴ Brooks v. Jenkins, 3 McLean, 432.

⁵ Allen v. Hunter, 6 McLean, 303.

⁶ Washburn v. Gould, 3 Story, 122.

spiral springs are not a modern invention does not show that the invention is not new.¹ So A. obtained a patent, for an improvement in packing hydraulic and other machines, by means of a lining of soft metal, and thereby of rendering certain parts of such machines air and fluid tight. B. afterwards discovered, that soft metal had the property of diminishing friction, and of preventing the evolution of heat when applied to the surfaces in contact of machines in rapid motion and subject to pressure, and he embodied the application of that discovery to machines in a patent. Held, the application of the soft metal by B. differed essentially from that of A., and B.'s patent was new.² And a patent is not void, merely because *every part* of the machine described is not the original invention of the patentee. It is for the parts claimed as his own invention, and as such particularly pointed out, that the patent is issued. It covers no more. And, if anything be included in a patent, or in the claim, which is not new, the patent is void.³

6. A new *composition of known materials*, or a new *combination of existing machinery*, producing a new and useful result, is the proper subject of a patent.⁴ Or a combination of old and new materials.⁵ The question is, whether the *whole* (made of old and new) is new, and this is a question for the jury.⁶ So a new and useful combination is entitled to a patent, though the parts were *in common use* before;⁷ in which case, the patent will be for the entire machine as combined, and not for its parts, and the parts are not withdrawn from the use of the community.⁸ But not a change of form merely, or of mechanical structure, which produces no new or materially improved result. And this, though patented, is an infringement of a prior

¹ Dunbar v. Marden, 13 N. H. 311.

² Newton v. Vaucher, 11 Eng. L. & Eq. 589.

³ Holliday v. Rheem, 18 Penn. 465.

⁴ Boville v. Moore, Dav. Pat. Cas.

361; Moody v. Fiske, 2 Mas. 112; Holliday v. Rheem, 18 Penn. 415.

⁵ Sellers v. Dickinson, 6 Eng. L. & Eq. 544.

⁶ Newton v. Grand, &c. 6 Eng. L. & Eq. 557.

⁷ 2 Kent, 371.

⁸ Brooks v. Jenkins, 3 McLean, 432.

patent.¹ So the substitution of one mechanical power for another—as of the wheel and axle for the screw—is not an *invention*.² And, as the *principle* of a machine is the operative cause by which a certain effect is produced; if machines are substantially alike in structure, and produce a similar effect, they are the same in principle. And merely changing the *position* of a machine does not alter its principle. So machines may differ somewhat in principle, and yet be substantially the same.³ While, on the other hand, a difference, in *form* or *proportions* only, makes no difference in the principle of machines. If they operate on the same principle in the application of the power, they are in law identical.⁴

7. A previous public use of the article by the patentee himself will avoid the patent. Thus a party, whilst engaged in carrying into effect a contract for the erection of a pier, invented certain machinery, which he used on the works for several months before applying for a patent, during which time it was open to the inspection of the public. Held, the invention had been dedicated to the public, and he was not entitled to a patent.⁵ So, if the first inventor has suffered his invention to go into public use, or to be publicly sold for use, before taking out a patent, the better opinion and the weight of authority is, that he cannot afterwards resume the invention and hold the patent.⁶ But the use or knowledge of the invention, prior to the application for a patent, will not affect the right of the inventor, if such knowledge was surreptitiously obtained and published, without his acquiescence in the public use of it, and if he immediately asserts his right.⁷

8. In general, the prior use of an invention, which invalidates a patent, is a use by persons in carrying on their trade, and without concealment. But it is doubted, whether a

¹ Sargent v. Larned, 2 Curt. 340.

² Blanchard's, &c. v. Warner, 1 Eq. 327.

Blatch. 258.

³ Brooks v. Jenkins, 3 McLean, 432.

⁴ Brooks v. Bicknell, 3 McLean, 250.

⁵ Adamson's Patent, 35 Eng. L. & Eq. 327.

⁶ 2 Kent, 368.

⁷ Shaw v. Cooper, 7 Pet. 292.

patent for improvements in a manufacture would be valid, if one person had previously perfected the article and sold it to the public, though he kept the process secret. The previous open use of the article, *per se*, avoids the patent. Hence where, in case for the infringement of a patent for improvements in the manufacture of iron and steel, by "the use of carburet of manganese in any process whereby iron is converted into cast steel," the plea denied the novelty of the invention; and it appeared from the evidence of witnesses for the defendant, that, for eight or ten years before the grant of the patent, three firms had manufactured steel in the manner described in the patent, and had used and sold the steel so manufactured in the way of their trade, and without concealment; and the judge directed the jury, that, if they believed the witnesses for the defendant, the patent was void; held, there was no other question for the jury, and that there was such a public use of the invention as invalidated the patent.¹

9. A patent issued in the United States, on the application of one believing himself to be the first inventor, is not invalidated by an invention made in a foreign country a few weeks or months preceding, but not patented or described in any printed publication, in such a manner as to embrace any substantial part of his invention, until after his application for a patent.²

10. Where, on an application for a patent, the papers are returned from the patent-office for informality; yet, if the application is followed up with reasonable diligence, and the patent granted, the right of the patentee will not be defeated, although he sold the patented article, after his application, and before the granting of his patent, and the officers of the patent-office failed to give information of his application to a person who made inquiries there with regard to it.³

11. With reference to the *utility* requisite to the validity of

¹ *Heath v. Smith*, 25 Eng. L. & Eq. 165.

² *O'Reilly v. Morse*, 15 How. U.S. 62.

³ *Sparkman v. Higgins*, 1 Blatch. 205.

a patent, an invention is *useful*, though not the very best for the intended use; if *at all valuable*, and susceptible of being employed for that purpose.¹ The right of an inventor depends upon the question, whether the machinery, as described, will or will not *practically and usefully accomplish the end*, not upon its being *more or less perfect*.² It need not supersede or be more useful than all other inventions for the same purpose. It is sufficient that it may be applied to practicable purposes, *with some degree* of beneficial use; that it is not injurious, frivolous, or insignificant, and has no pernicious, immoral, or mischievous tendency; and, so far as it is applied, is salutary.³ And, upon the question of *utility*, courts are not rigid. Unless the invention be shown to be absolutely frivolous and worthless, the patent is valid.⁴ Thus approving of and using a patented improvement is an acknowledgment of its utility, and the user must pay for it.⁵ So the patent itself raises the presumption of novelty and utility; and upon this inquiry the burden of proof is upon the defendant.⁶

12. As already stated, (p. 164,) to constitute a prior invention, the party must have *reduced his idea to practice*, and embodied it in some distinct form. It is not enough, that another conceived the possibility of effecting what the patentee accomplished.⁷ A mere *principle* is not patentable.⁸ Thus neither electricity nor steam can be exclusively appropriated, except by mechanical inventions or combinations, which produce a certain effect.⁹ And, on the other hand, it is not necessary for the protection of a patent, that the patentee should be the first person who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or

¹ *Many v. Jagger*, 1 Blatch. 372.

⁵ *Simpson v. Mad River, &c.* 6

² *Parkhurst v. Kinsman*, 1 Blatch. 488. McLean, 603.

⁶ 5 McLean, 44.

³ *Dunbar v. Marden*, 13 N. H. 311;
Howell v. Lewis, 1 Mas. 182; *Bedford*
v. Hunt, 1b. 302.

⁷ *Parkhurst v. Kinsman*, 1 Blatch. 488. See *Morewood v. Tupper*, 30 Eng. L. & Eq. 555.

⁴ *Parker v. Stiles*, 5 McLean, 44.

⁸ *Smith v. Ely*, 5 McLean, 76.

⁹ *Ibid.*

valuable result. He who reduces speculation to practice, whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine, or product, is entitled to the patent right.¹ Hence a patent for "the use of the motive-power of the electric or galvanic current, (called electro-magnetism,) however developed, for making or printing intelligible characters, signs, or letters at any distances, being a new application of that power," and not limited to the specific machinery described in the specification, is held too broad, and therefore void.² And it is no objection to the granting of a patent, that the discovery or invention occurred *by accident*.³ Nor is the right of an inventor to a patent impaired, by making inquiries of, or receiving information or advice from, men of science, in the course of his researches.⁴

13. The question sometimes arises, whether a patent is granted for a *machine* or a *process*. Thus a patent for "a new and useful machine for rolling puddle-balls, or other masses of iron, in the manufacture of iron," the specification annexed to which describes the improvement as consisting in "the employment of a new and useful machine for rolling of puddlers' balls," although the claim is for "the preparing of the puddlers' balls as they are delivered from the puddling furnace, by causing them to pass between a revolving cylinder and a curved segmental trough adapted thereto, constructed and operating in the manner of that herein described," &c., is a patent for a machine, and not for a process.⁵ But whether the invention is a process or machine, is not a question upon which the law allows the opinion of an expert.⁶

14. A claim for a patent, for *improvements* in the mode of doing anything by a known process, is sufficient to entitle

¹ Goodyear v. Day, 2 Wallace, Jr. 283.

² O'Reilly v. Morse, 15 How. U. S. 62.

³ Earle v. Sawyer, 4 Mas. 1.

⁴ O'Reilly v. Morse, 15 How. U. S. 62.

⁵ Corning v. Burden, 15 How. U. S. 252.

⁶ Ibid.

the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed and their application.¹ And mere change in the form of the machinery (unless a particular form is specified as the means by which the effect described is produced) or in some unessential parts, or the use of known equivalent powers, not essentially varying the machine, or its mode of operation or organization, will not make the new machine a new invention; nor, although it be an improvement on the former, justify its use without the consent of the first patentee; although a patentee may obtain a new patent, for such an improvement on his own invention, already patented, as might be patented if invented by another person.²

15. The same patent cannot include two distinct machines; but a claim for a combination of mechanical powers, and the invention or improvement of one or more of the parts of which the combination consists, may be included in one patent.³ And a patent, covering, (1) an improvement in a steam-engine, converting the reciprocating motion of the piston into a continued rotary motion, by means of a revolving shaft parallel with the piston-rod, to which motion is communicated by a friction-roller on the piston-rod moving in a spiral groove in a cylinder on the shaft; (2) the application of the motion of this shaft to make the capstan of a steamboat revolve; and (3) an improvement in the form of a spiral paddle-wheel of a steamboat; is held not to be bad, as covering distinct and independent inventions.⁴ But where a patentee claims three distinct improvements, he must show himself entitled to each to sustain an action.⁵

16. A distinction is made between a patent for *a mode of*

¹ *Electric, &c. v. Brett*, 4 Eng. L. & Eq. 347.

² *O'Reilly v. Morse*, 15 How. U. S. 62.

³ *Root v. Ball*, 4 McLean, 177; *Parker v. Haworth*, *Id.* 370.

⁴ *Hogg v. Emerson*, 11 How. U. S. 587.

⁵ *Heinrich v. Luther*, 6 McLean, 345.

manufacturing a particular article, and *for the article itself*. Thus a patent was taken out, the title of which was (after a disclaimer of part) for "improvements in the manufacture of candles." The specification stated the invention to relate to "a mode of manufacturing candles by the application of two or more plaited wicks in each candle," and set out at length the mode of so placing the wicks, that, in burning, the ends always turned outwards. In an action for infringement, a candle was produced which had been made at the defendant's manufactory, in which the wicks turned outwards in burning, but no evidence was offered of the mode in which it was made. Held, that there was no evidence of infringement, the patent being for the mode of manufacturing such a candle, and not for the candle itself.¹

17. A patentee cannot maintain his patent if he is not *the sole* inventor; and, if the principal feature of the invention is suggested to him by another, he is not entitled to a sole patent.² (a) But, on the other hand, a joint patent is void, if it appear that all the patentees did not participate in the invention; though the patent is *prima facie* evidence of such participation.³

18. In regard to what constitutes violation or *infringement* of a patent, the exclusive right in a patent is the con-

¹ *Palmer v. Wagstaffe*, 25 Eng. L. & Eq. 535.

² *Hotchkiss v. Greenwood*, 4 McLean, 556.

³ *Thomas v. Weeks*, 2 Paine, 92.

(a) L. and W. were joint patentees of an invention for propelling vessels, and, whilst engaged in making experiments with regard to it, an accident happened, which appeared to have suggested to each an improvement upon the method previously adopted. They communicated their ideas to each other, but neither took any steps to secure the benefit of the invention for two years, when L. applied for a patent, against the sealing of which W. entered a *caveat*, on the ground that he (W.) was the first inventor. The evidence on this point being conflicting, it was held, that L., having first applied, was entitled to have his patent sealed, though possibly W. might be able to get it repealed upon *scire facias*. *Lowe's Patent*, 35 Eng. L. & Eq. 325. See *Allen v. Blunt*, 2 W. & M. 121.

struction and use of the thing patented. Thus, where the right consists in certain instruments, by which a bedstead of a particular structure is made, the making and using of these instruments is prohibited; but the sale of the bedsteads when manufactured is not.¹ But imitation of *any part* of the article patented is an infringement.² Thus the title of a patent, and every part of the specification, in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one half of the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery. Held, nevertheless, that, the defendants having been found by the jury to have adopted *a part* of the plaintiff's invention, the patent had been infringed.³ So, if any part of the invention be used, the *simplicity* of such invention does not affect the question of infringement. Thus the jury found, that "the sending of signals to intermediate stations" was a new invention of the patentees, and had been adopted by the defendants. There was a distinct claim in the specification for this improvement, and the method of carrying it into effect was pointed out. Held, that this was the proper subject of a patent; that the obviousness and simplicity of the idea and method did not make any difference; and that the plaintiffs were entitled to a verdict in respect of such finding, although by the defendant's method signals were sent from, as well as to, intermediate stations.⁴ (a) So the

¹ *Boyd v. Brown*, 3 McLean, 295. *Ib.* 279; *Brooks v. Fiske*, 15 How.

² *Smith v. London, &c.* 20 Eng. L. & 212.
³ *Morewood v. Tupper*, 30 ⁴ *Electric, &c. v. Brett*, 4 Eng. L. &
Ib. 555; *Byam v. Bullard*, 1 Curt. 100; *Eq.* 347.
Byam v. Farr, *Ib.* 260; *Foster v. Moore*, ⁴ *Ibid.*

(a) The plaintiffs' system was worked by six wires, but no specific claim was made to any particular number of wires, or any particular system of

use of *the elements* of a composite substance is a use of the composite, and an infringement of a patent for the use of the composite substance.¹ And where the elements of a composite substance are used, and in the process of the manufacture the composite is itself formed, this is not the use of *an equivalent* for that substance, but the use of the substance itself.² And a patent for the use of a substance in a process is held to be infringed, by the use even of a chemical equivalent, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colorable variation therefrom.³ But a patent for a combination of known mechanical powers is not infringed, unless the same parts are used in the same combination.⁴ Nor by using a part of the combination.⁵ Although a patented combination cannot be lawfully used, though something be added to it.⁶ And in general the plaintiff must show, that the defendant has used his invention, either in the precise form in which it is constructed under the patent, or in a form, and on principles, substantially the same. If the operative principle of two machines be the same, the substantial identity contemplated by the patent law is established.⁷ (a)

¹ Heath v. Unwin, 14 Eng. L. & Eq. 202.

² Ibid.

³ Per Erle, J., Ibid.

⁴ Brooks v. Bicknell, 4 McLean, 70.

⁵ M'Cormick v. Maury, 6 McLean, 539; Stimpson v. Baltimore, &c. 10 How. 329.

⁶ Pitts v. Wemple, 6 McLean, 558.

⁷ Parker v. Stiles, 5 McLean, 44.

making the signals. The defendants used only one wire, and made the signals in a different manner, by counting repeated deflections of the needle. Held, that a finding of the jury, "that as a whole the system of counting with one wire and two needles is not the same as the system of the plaintiffs," did not entitle the defendants to a verdict, the plaintiffs' claim not being to any particular system, but to the particular improvements pointed out in the specification. Electric, &c. v. Brett, 4 Eng. L. & Eq. 347.

(a) Where, in a suit for infringing a patent for a saw-set, the declaration set forth in the specification a hammer of wrought iron with a steel point, as part of the set, and the hammer of the defendant's set was all of steel; it was held to be no infringement, or a very doubtful one. Aiken v. Bemis, 3 W. & M. 348.

So a patent for the employment on railroads of narrow grooves, either

19. With reference to the form of action for infringement, where the infringement was alleged to have been made upon the right granted to the plaintiff as the inventor of a machine, and also of the right granted to him as the inventor of *an improvement* thereon; it was held, that they constituted one and the same cause of action, and should be joined.¹ (a)

¹ Case *v. Redfield*, 4 McLean, 526.

cast in iron plates, or formed by the juxtaposition of two flat iron rails, on each side of the track, for the flanges of the car-wheels to run in, by which the track is adapted to the unobstructed passage over it of common carriages, and to the running of the wheels of the cars on slight curves without dragging; is not infringed by the use of a double flat iron rail, with a groove in it large enough to admit the flange of the wheel, on the inner side of a curve or corner intended to be passed, and of a common flat rail on the outer line of the same curve, both elevated above the ground as high as the general track of the road. *Stimpson v. Baltimore, &c.* 10 How. U. S. 329.

So, where a person held a patent for an improvement in making friction matches, the invention being only a new combination of old materials before in use, consisting in a composition formed of phosphorus, with the earthy material and the glutinous substance only, without the presence of chlorate of potash, or of any other like objectionable ingredient; it was held, that any person may use any one or all the materials forming the composition, in making matches, provided he does not use them in the combination patented, or that any one may lawfully use them for such purpose, in combination with chlorate of potash, as they were formerly used; though a mere colorable difference or slight variation of the combination would not exempt a person from the charge of infringement. *Byam v. Eddy*, 24 Verm. 666.

(a) In England, where specific statutory provisions are made for the regulation of trials in patent causes, the following points have been decided:—

In an action for infringement of a patent, it is sufficient for the plaintiff to furnish such particulars of the infringement as show distinctly what are the acts of infringement he complains of—that is the article, the making or selling of which he alleges is an infringement upon his patent, and the places at which, and the period during which, he proposes to prove such making or selling; and it is not necessary to specify in what respects, or as to what parts or processes of the invention, it is an infringement. *Talbot v. Laroche*, 26 Eng. L. & Eq. 286.

If the processes are so entirely separate and distinct, that different kinds of articles or results are produced, as if one produce pictures in oil and another in water colors, it seems that the particulars should specify

20. The defendant, in a suit for infringement of a patent, may offer in evidence a later patent.¹

21. Where the plaintiff makes out a *prima facie* case for the violation of his patent, and then the defendant goes forward to prove his special defence, under a notice that the invention had been known and used at divers places by divers persons, it is right to instruct the jury, that, on this defence, it is the duty of the defendant to turn the scales of evidence in his favor.²

22. Where a machine was purchased of the supposed inventor, which had been held to be an infringement of another patented invention in one circuit, the purchaser was not allowed to use the same machine in another circuit, so long as the injunction and the decision remained in force.³

¹ Corning v. Burden, 15 How. 252.

² Allen v. Blunt, 2 W. & M. 121.

³ Woodworth v. Edwards, 3 W. & M. 120.

the one, an infringement upon which is complained of; but if they are merely different modes of producing the same kind of article or result, it is not necessary so to distinguish; and it is not necessary to specify particular persons to whom, or the times at which, the article alleged to be a piracy has been sold; it is enough to state some period within which the sales took place. *Ibid.*

A declaration in case, for the infringement of a patent, "for improvements in giving signals and sounding alarums in distant places by means of electric currents transmitted through metallic circuits," alleged that the defendants had used "the said invention." The specification of the patent made nine several claims in respect of different improvements. The jury having found an infringement in respect of one of such improvements, that was held to be a sufficient finding of the infringement alleged in the declaration. *Electric, &c. v. Brett*, 4 Eng. L. & Eq. 347.

The defendant's particulars of objection in support of his pleas, in an action for the infringement of a patent for the manufacture of candles, after alleging that the invention was not new, stated that it had been used by the plaintiff and certain other persons who were named, "and by candle-makers generally in London and the vicinity thereof." Held, that this was a sufficient compliance with the statute 15 & 16 Vict. c. 83, § 41, which requires such particulars to state the place or places at or in which the invention is alleged to have been used. *Palmer v. Wagstaffe*, 20 Eng. L. & Eq. 527.

23. In reference to the *specification* preliminary to the obtaining of a patent; the specification of a patent, as well as the patent itself, is to be construed liberally or benignly in favor of the patentee;¹ with a fair purpose of carrying out the provisions of the constitution, and the laws based thereon;² not by the grammatical arrangement of the words, but according to their true import;³ and with reference to practical views rather than subtle distinctions.⁴ And in considering the validity of a patent, objected to for want of a proper "description of the invention or discovery," filed previously to its issue, this description, even if quite wide of truth when taken literally, may be aided and made good by the description of "the manner and process of making, constructing, using, and compounding the same." Thus, where the "description of the invention or discovery" described a process, and did not describe a product, but the description of "the manner and process" showed that the purpose and merit of the process was the production of a valuable "fabric," it was held, in a suit for infringing the patent, by improperly using the product, to be no objection, that the "description of the discovery or invention" described not it, but a process; the "description of the manner and process" showing, that the purpose and merit of the process was the production of a "fabric."⁵ So the entire specification and drawings are to be examined, and, though there is an error in showing how a particular element enters into the combination claimed, if the residue of the specification and the drawing afford means to correct this mistake, it does not avoid the patent.⁶ And although, generally, the *summary* is to govern; yet, where it refers to the specifications and drawings, they may be taken to aid in construing it.⁷ So even drawings which are not referred to.⁸ But, although the machine need

¹ *Winans v. Denmead*, 15 How. U. S. 330; *Goodyear v. The Railroad*, 2 Wallace, Jr. 356.

² *Parker v. Stiles*, 5 McLean, 44.

³ *Allen v. Hunter*, 6 McLean, 303.

⁴ *Davoll v. Brown*, 1 W. & M. 53; *Woodworth v. Hall*, 1b. 248.

⁵ *Goodyear v. The Railroad*, 2 Wallace, Jr. 356; acc. *Brooks v. Bicknell*, 3 McLean, 250.

⁶ *Kittle v. Merriam*, 2 Curt. 475.

⁷ *Hovey v. Stevens*, 3 W. & M. 17;

Hogg v. Emerson, 11 How. 587.

⁸ *Washburn v. Gould*, 3 Story, 122.

not be described by the specification in technical terms; it must be described in clear and precise language. Thus the plaintiff patented "a new and useful improvement in the machinery for grinding knives." On a motion to set aside a nonsuit, it was held, that not only the machine should be described in the specification, but also the new combination, or part claimed as the improvement.¹ So, to a declaration for infringement of a patent, for "certain improvements in valves or plugs for the passage of water or other fluids," the pleas were, not guilty; that the plaintiffs were not the first inventors; and that the invention was not new. At the trial, the plaintiffs put in the specification, which, after describing the invention, claimed as "the improvements" three things, each of which, taken by itself, was old. Held, the patentee might give evidence, that the real invention he claimed was a combination of these three things, and that the specification was not conclusive evidence on this point; but, it seems, the specification was bad.² It is to be observed, however, that an improvement of a machine, for which a patent may be obtained, may consist of the introduction of a new element into an old machine, which produces a new and useful result, or greater facility in the application of power; and though it appears, from the description or specification of the claimant for an improvement, that part of the elements, included in the description or specification, were not new, but claimed to be newly combined with new elements, the patent is not therefore void.³ And, in general, if the patentee claims more than he has invented, his patent is not void; but, so far as his invention goes, he is protected.⁴ So, in an action for infringement of a patent, the Court disallowed the following plea: that the plaintiff, having petitioned for letters-patent, represented to the solicitor-general, to whom the matter was referred, that the invention consisted of matters mentioned in a paper writing exhibited to the solic-

¹ *Hovey v. Stevens*, 3 W. & M. 17.

² *Bateman v. Gray*, 20 Eng. L. & Eq. 520.

³ *Rheem v. Holliday*, 16 Penn. 347.

⁴ *Peterson v. Wooden*, 3 McLean, 248.

itor general, (setting it forth,) who, confiding therein, reported that the letters-patent might be granted; that, after the grant of the letters-patent, the plaintiff enrolled his specification in certain terms, and falsely described his invention therein; and that so much of the invention, as was stated in the specification, was not part of the invention in the paper writing and letters-patent mentioned, and was not part of the invention for which the letters-patent were granted.¹ (a)

24. It has been seen, (p. 177) that, notwithstanding the general rule, that the privilege of a patentee is to be liberally construed, if the specifications do not describe the invention with reasonable certainty and precision, he can claim nothing under his patent.² And the same rule applies, if a patentee claims anything as a material part of his improvement or combination, as new and original with him, which is shown to have been discovered prior to the emanation of his patent.³ It is for the jury to determine, whether the description of a machine in the specification is clear enough, to enable a mechanic of ordinary skill to construct the machine without experiments.⁴ It is not enough to describe the whole machine with certainty; but the parts claimed as improvements must be certainly described.⁵ And where too much is claimed, the patent is void, unless the patentee disclaims as to the

¹ *Hancock v. Noyes*, 24 Eng. L. & Eq. 510. ⁴ *Hogg v. Emerson*, 11 How. U. S. 587; *Wood v. Underhill*, 5 How. 1;

² *Parker v. Stiles*, 5 McLean, 44; *Brooks v. Bicknell*, 3 McLean, 250.
Davoll v. Brown, 1 W. & M. 53.

³ *Parker v. Stiles*, 5 McLean, 44. ⁵ *Hovey v. Stevens*, 3 W. & M. 17.

(a) A description, by an applicant for a patent, of a machine, in which he sets forth his invention to be for a combination of machinery, not giving notice that he claims any part as new, is a dedication of that part to the public. After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of 1836, nor the 7th section of the act of 1837, relating to amending of patents, authorizing a new patent for an invention different from that originally patented. *Batten v. Taggart*, 2 Wallace, Jr. 101.

A patentee, who uses certain words in his specification, and then takes out an amended one, omitting them, is not estopped by those words, after being thus withdrawn. *Allen v. Blunt*, 2 W. & M. 121.

excess; and his disclaimer should be filed in the patent-office.¹ So where a patentee does not certainly describe his invention, so that it can be clearly distinguished; if he have an invention, his remedy is by an amendment to his specification, or a new patent.² Thus, in illustration of the rules upon this subject above stated, where a combination of two motions was claimed in the summary as new, and gave a traversing motion to a spiral knife, in combination with a reciprocating rotary motion, and these motions, so combined with the means of producing them, seemed from the specification to be the subject of the patent; they were held patentable. But as it was admitted, in an amendment to the specification, that the combination was not a novelty, and no other combination or part was described in the specification or summary as the improvement, the patentee was not allowed to support his patent on any other combination or part.³ So the specification of a patent, for improved arrangements for raising ships' anchors, claimed as the invention a cable-holder, thus described: "The scalloped shell in which the iron chain-cable appears in the drawing is upon a new plan, to hold, without slipping, a chain-cable of any size, as shown by the opening form of the scallops at the top and bottom of figure 2." It also claimed as the invention of the patentee, "the new form of a scalloped shell, (as shown in figure 2,) in conjunction with the arrangements hereinbefore described." A drawing attached to the specification showed, that the inner sides of the cable-holder and the scallops were not to be parallel, but should converge towards the centre of the cable-holder. In an action for an infringement of the patent, it was proved, that the specification and drawing would enable a competent workman to make a cable-holder, which would hold chains of different sizes. Held, that the specification did not sufficiently describe the nature of the invention; that it was at least ambiguous, whether it was an invention of a cable-holder to

¹ *Hovey v. Stevens*, 3 W. & M. 17.

² *Ibid.*

³ *Ibid.*

hold one cable of whatever size, or to hold cables of different sizes, and it was therefore bad.¹ So A. obtained a patent for "an improved turning-table for railway purposes," and in his specification gave a description of the machinery, of which no part was in fact new, except certain suspending rods. The combination, however, was both new and useful. In the specification, the patentee claimed as his invention the "improved turning-table hereinbefore described, such my invention being to the best of my knowledge and belief entirely new." Held, the specification was insufficient, for not showing what was new and what old.²

25. It has been held that the construction of the specification is for the Court, unless parol evidence be introduced.³ So, that the sufficiency of the specification is for the Court, except in reference to technical terms, and the testimony of experts.⁴ So the meaning of technical words.⁵ But, on the other hand, it is held, that the sufficiency of a description is for the jury.⁶ So the question, which of the described parts are necessary to produce the result.⁷

26. As already suggested, (p. 178,) an *excessive* claim in the specification is held to be bad.⁸ And, if the inventor of an improvement obtain a patent for the whole machine, or mix up the new and old discoveries, or incorporate in his specification inventions neither new nor his own; the patent is wholly void.⁹ So unless it appear, whether the patent is for a *new combination*, or *new parts*.¹⁰ And the description must distinguish new from old.¹¹ Though a description of *improvements* is sufficient.¹² So the relative proportion of the ingredients must be stated.¹³ But the objection to a patent arising from

¹ Hastings v. Brown, 16 Eng. L. & Eq. 272.

² Holmes v. The London, &c. 16 Ib. 409.

³ Davoll v. Brown, 1 W. & M. 53.

⁴ Brooks v. Jenkins, 3 McLean, 432.

⁵ Washburn v. Gould, 3 Story, 122.

⁶ Wood v. Underhill, 5 How. 1; Wallington v. Dale, 16 Eng. L. & Eq. 584.

⁷ Sisby v. Foote, 14 How. U. S. 218.

⁸ Tetley v. Eaton, 22 Eng. L. & Eq. 321.

⁹ Brunton v. Hawkes, 4 B. & Ald. 540; Lowell v. Lewis, 1 Mas. 189.

¹⁰ Hovey v. Stevens, 1 W. & M. 290.

¹¹ See Regina v. Bessell, 4 Eng. L. & Eq. 311.

¹² Brooks v. Jenkins, 3 McLean, 432.

¹³ Brooks v. Bicknell, 3 McLean, 250.

¹⁴ Wood v. Underhill, 5 How. U. S. 1.

an excess in the specification may be cured by a disclaimer of such excess in reasonable time.¹ (a)

27. With regard to the *transfer* of a patent, or a license to use it, an invention may be assigned before application for a patent. But the patent must be applied for and issued in the name of the inventor; though, when issued, it inures to the benefit of the assignee.² So the inchoate right of an inventor, to the exclusive privileges under an *extension* of letters-patent, is the subject of a sale.³ So, it seems, a license to run a patented machine, not being considered a personal privilege, is assignable. But, unless the assignee perform the conditions of the license, it will be forfeited.⁴

28. One licensed to *use* a machine may repair it, or purchase another; for the right of use implies the right of purchase; but he cannot *construct* one.⁵ And, although the sale of a machine by the patentee implies a license to use it, it is otherwise with a sale by a licensee.⁶

29. He who would claim the benefit of the seventh section of the patent act of 1839, c. 88, must be a purchaser, or one who has used the invention, before the patent was issued, by a license or grant, or by the consent of the inventor, and not a purchaser under a mere wrongdoer.⁷

¹ Brooks v. Jenkins, 3 McLean, 432. See Wallington v. Dale, 16 Eng. L. & Eq. 584; Silsby v. Foote, 14 How. U. S. 218; Hovey v. Stevens, 1 W. & M. 290; Regina v. Mill, 1 Eng. L. & Eq. 346; Warwick v. Hooper, 3 Ib. 233.
² Rathbone v. Orr, 5 McLean, 131.
³ Clum v. Brewer, 2 Curt. 506.
⁴ Wilson v. Stolly, 5 McLean, 1. See Pitts v. Jameson, 15 Barb. 310.
⁵ Bicknell v. Todd, 5 McLean, 236.
⁶ Wilson v. Stolly, 4 Ib. 275.
⁷ Pierson v. Eagle, &c. 3 Story, 402.

(a) It is held that an inventor, whose claim in his specification is too broad in law, though not covering more than he actually invented, is not entitled to recover costs, in an action brought for an infringement of that part of the patent to which he is entitled, without disclaiming the remainder within a reasonable time. But if the patent is held valid by the Circuit Court, and in relation to its validity there are differences of opinion between the Judges of the Supreme Court, a disclaimer is filed in reasonable time, if filed so soon as the claim is decided to be invalid by the Supreme Court. O'Reilly v. Morse, 15 How. 62. See Guyon v. Serrell, 1 Blatch. 244.

30. *The administrator* of a patentee may assign the patent, if renewed in his name, and, in a proceeding for an infringement of the right, the assignee need only prove the assignment, in support of his title, without showing the formalities of the administrator's sale.¹

31. By the patent act of 1836, every assignment of a patent must be *recorded* in the patent-office within three months from the time of its execution ; but a failure to do so does not affect the rights of the assignee as against the assignor, but only as against subsequent assignees. But subsequent assignees, after the lapse of three months, with or without notice of the former assignment, and whose assignments are regularly recorded, will hold as against the prior assignee.²

32. An assignee of a patent is not presumed to have it in his power to produce any original assignment prior to his own. Copies of such prior assignments, from the patent-office, are therefore admissible.³

33. A patentee, or his assignee, in transferring part of the patent, may reserve the right to prosecute for piracies ; but, when he has divested himself of that right, by conveying all his interest in the patent within the territory transferred, the owner of the patent may thus prosecute.⁴ And where a grant was made of a right to construct and use fifty machines, within certain localities, reserving to the grantor the right to construct, but not to use them, therein ; held, the grant was of an exclusive right, under the statute of 1836, in regard to patents, and that suits were to be brought in the name of the assignees, even though agreed to be at the expense of the grantor.⁵ But where a transfer of certain specified privileges, part of larger privileges secured by patent right, does not confer a legal title to the whole, or to an undivided portion of the right, nor grant the entire or exclusive right within a specified part of the United States ;

¹ *Brooks v. Jenkins*, 3 McLean, 432.

² *Boyd v. McAlpin*, 3 Ib. 427.

³ *Brooks v. Jenkins*, 3 Ib. 432.

⁴ *Bicknell v. Todd*, 5 McLean, 236.

⁵ *Washburn v. Gould*, 3 Story, 122.

as where the holder of a patent for turning irregular forms, generally, grants to another the full and exclusive license, right, and permission to use it for turning shoe-lasts; a suit for an infringement of the privilege so transferred must be brought in the name of the original holder.¹

34. If a license to use a patented machine be conditional, the conditions must be performed, or there will be no right to the use; and an attempt to use it will be an infringement, authorizing an injunction, as there is no adequate remedy at law. Thus, where a license to use a planing machine is granted, on rendering a weekly account of the boards planed, and paying a certain sum, and other conditions, the payment must be made weekly, to authorize the use. And any alleged failure, on the part of the owner of the patent, under the license, will not authorize its use, unless the person licensed has performed all his part of the contract.²

35. An assignment of an existing patent, "to the full end of the term or terms for which letters-patent are or may be granted," embraces a subsequent *renewal* of the patent.³ And the purchaser of a patent machine has a right, after the expiration of the term for which the patent was originally granted, and the extension of the patent in favor of the original patentee, to repair his own machine when necessary, although the repair consist in a replacement of an essential part of the combination patented.⁴ So, when the term expires, a machine, then in use under the conveyance, may without any new license or grant be employed, till it wears out or is destroyed, either by the purchaser or his assigns, notwithstanding A. has obtained an extension and renewal of his patent right.⁵ But, where the original patentee has notice, not only of a prior invention, but of its public use, he is bound to make inquiries, and a subsequent assignee

¹ *Blanchard v. Eldridge*, Wallace, Jr. 337.

⁴ *Wilson v. Simpson*, 9 How. U. S. 109.

² *Brooks v. Stolley*, 3 McLean, 523.

⁵ *Woodworth v. Curtis*, 2 W. & M.

³ *Phelps v. Comstock*, 4 Ib. 353; *Case v. Redfield*, Ib. 526.

of the patent cannot affect ignorance, on applying for a confirmation of the patent after it is found on a trial at law to be void.¹ (a)

36. No injury is a more frequent subject of *equity* jurisdiction, than the infringement of patents; usually for the purpose of a perpetual or temporary *injunction*. Upon this subject it is held, that, where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a patent, and the fact of infringement, it will not send the case to a jury to have its verdict, prior to granting a perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that the Court can decide them on the testimony of men of science, as well as or better than a jury; and where a jury trial would be long, costly, or troublesome.² Thus, where a patent had been in force for twelve years, and had been the subject of four suits

¹ Honiball's Patent, 33 Eng. L. & Eq. 20.

² Goodyear v. Day, 2 Wallace, Jr. 283. See Buck v. Gill, 4 McLean, 174; Parker v. Hatfield, Ib. 61; Gittins v. Symes, 28 Eng. L. & Eq. 380; Sargent

v. Larned, 2 Curt. 340; Clum v. Bremer, Ib. 506; Woodworth v. Stone, 3 Story, 749; Orr v. Littlefield, 1 W. & M. 13; Hovey v. Stevens, Ib. 290; Woodworth v. Hall, Ib. 248; Washburn v. Gould, 3 Story, 122.

(a) With regard to the *mutual* rights and obligations of the assignor and assignee of a patent; in an action on a bond, given for the purchase of a patent, in which there is no admission of the existence of the patent, or the right to sell it, the defendant is not estopped from denying its existence, its validity, or the right to sell it. Nye v. Raymond, 16 Ill. 153.

If the assignee of a patent has received profits from it, and then seeks to have the assignment rescinded for fraud, he must aver in his bill that such profits were received prior to the discovery of the fraud, and must return them, or offer so to do. Edmunds v. Myers, 16 Ill. 207.

Where a patent has been assigned for certain counties, and the assignee has made large sales under it, and then applied by bill in equity to have the contract rescinded, and the consideration returned, upon the ground of misrepresentation and fraud, but making no offer to account for the sales; a decree, ordering such rescission and repayment, is erroneous, inasmuch as it fails to restore the vendor to his rights in an equal degree. Ibid.

against different persons, all of which terminated favorably to the patentee, and in two of which verdicts had been given in favor of the validity of the patent; it was held, that, in a fifth case, the patentee was entitled to an injunction, pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention.¹ So the distinction is made, that, where a patent is new, the Court considers the proof of the title in the patentee to be wanting, inasmuch as the public have had no opportunity of contesting its validity, and therefore refuses to interfere by injunction until the title has been established at law; but where there has been long enjoyment (including user) under a patent, the public have had an opportunity of contesting the patent, and the fact of their not having done so successfully is at least *prima facie* evidence that the title of the patentee is good; and the Court therefore interferes, in such a case, before the right is established at law.² And where sufficient possession is made out, a doubt as to the validity of the patent will not necessarily prevent an injunction. The Court will look to the circumstances, and the comparative inconvenience or loss to be occasioned by granting or withholding it.³ But, before a patentee can have an injunction, he must show an exclusive enjoyment, long enough to justify the presumption of a right, or an incontestible right.⁴ No specified time of use is requisite. It depends on the extent as well as duration of the use or sales, the utility of the invention, the number of persons interested in questioning the right, and the completeness of acquiescence in it.⁵

37. Where the right to a temporary injunction does not depend upon any controverted and doubtful facts, but upon the interpretation to be put upon a written instrument, it is the duty of the Court to interpret it, and grant or refuse the

¹ Newall v. Wilson, 19 Eng. L. & Eq. 156.

² Caldwell v. Van Vliessenger, 9 Eng. L. & Eq. 51. See Foster v. Moore, 2 Curt. 553.

³ Sargent v. Seagrave, 2 Curt. 553.

⁴ Thomas v. Weeks, 2 Paine, 92.

⁵ Sargent v. Seagrave, 2 Curt. 553.

injunction accordingly.¹ And if, from the various transfers of a patent right, it be doubtful whether an action at law can be brought, so as to obtain relief for the injury complained of, equity will take jurisdiction.² But a court of equity will not enjoin the equitable owner of a patent, on the application of the legal owner.³

38. Circumstances sometimes require an *account* in connection with an injunction. Thus, on a motion for a provisional injunction, the originality of the invention was strongly denied by affidavit, and it appeared that there had been three trials at law on the question of the originality, in the first of which the jury found against the patent, in the second did not agree, and in the third found in its favor. The Court suspended a decision on the motion, and ordered the case to be tried by a jury, directing an account to be kept by the defendant in the mean time, and to be reported monthly, under oath, to the clerk. The question of infringement was also ordered to be tried by the same jury.⁴

39. On a motion to *dissolve* an injunction, on affidavits, the defendant's proof must overcome the equity of the bill and the evidence in its support.⁵

40. Where one of three parties runs a machine, and the other two own it, an injunction against the three is proper.⁶

41. Where the district Judge, sitting for the Circuit Court, and being satisfied of an infringement, had granted an interlocutory injunction, till trial, to restrain the use of a machine, and the presiding Judge, after hearing the evidence before the jury on the trial, differed from his brother, who, after hearing the same evidence, still retained his former opinion, and the jury could not agree upon a verdict; it was held that the full Court, in its subsequent action on the injunction, were not bound to retain or dissolve it; and they

¹ Clum v. Brewer, 2 Curt. 506.

² Bicknell v. Todd, 5 McLean, 236.

³ 2 Curt. 506.

⁴ Allen v. Sprague, 1 Blatch. 567.
See The Troy, &c. v. Corning, Ib. 467.

⁵ Sparkman v. Higgins, Ib. 205. See
Orr v. Merrill, 1 W. & M. 376; Woodworth v. Hall, 3 Story, 749.

⁶ Woodworth v. Edwards, 3 W. & M. 120.

ordered the injunction to be dissolved upon the defendant's giving security to account.¹

42. The district Judge, sitting for the Circuit Court, and being himself well satisfied of an infringement of a patent, although, of numerous experts examined, a majority think differently from him on that point, may grant an interlocutory injunction to restrain the use of a patented machine as an infringement of a prior one, the machine last patented not having been granted, after notice from the patent-office to the complainant to appear and be heard.²

43. With reference to the amount of *damages* for infringement of a patent, the rule is not the same where the patent is only for *an improvement*, as where the patent covers the whole machine.³ The rule is, to give, not vindictive and exemplary, but actual damages, which will be the ordinary profit derived by the patentee from the sale of the article.⁴ Thus the evidence showed, that the patentee granted licenses for ten dollars a machine, and that the defendants had used his patent in three hundred machines, and refused to pay the usual license price; but there was no evidence of any other damage. Held, the license price fixed the rate of damages.⁵ A jury cannot allow any expenditure for counsel fees or other charges, even though necessarily incurred to vindicate the patent, and though not taxable costs.⁶ Ignorance of the existence of the patent may be considered in mitigation of damages.⁷

44. With reference to *the mode of trial* in patent causes, when a claim, in the specification of a patent, without specifying the particular elements which compose the combination intended to be patented, declares that the combination is made up of so much of the described machinery as effects

¹ *Wilson v. Barnum*, Wallace, Jr. 347.

² *Ibid.*

³ *Seymour v. M'Cormick*, 16 How. 480.

⁴ *Buck v. Hermance*, 1 Blatch. 398; *Parker v. Corbin*, 4 McLean, 462.

⁵ *Seymour v. McCormick*, 16 How. 480.

⁶ *Stimpson v. The Railroads*, Wallace, Jr. 164; *Blanchard's, &c. v. Warner*, 1 Blatch. 258.

⁷ *Hogg v. Emerson*, 11 How. 587.

a particular result; it is a question of fact for the jury, which of the described parts are essential to produce that result.¹ So the question, whether drawings, destroyed by the fire at the patent-office in 1836, were replaced within a reasonable time, so as to preclude the idea of neglect or a design to mislead the public, is a question of fact for the jury.²

45. Parol evidence is not admissible to show at what time a patent was applied for.³

46. The patent act contemplates two classes of persons as peculiarly appropriate witnesses in patent cases, viz : 1st. Practical mechanics, to determine the sufficiency of the specification as to the mode of constructing, compounding, and using the patent. 2d. Scientific and theoretic mechanics, to determine whether the thing is substantially new in its structure and mode of operation, or a mere change of equivalents; and the second class is said to be by far the higher and more important of the two.⁴

47. *Oyer* of letters-patent is not demandable. And craving *oyer* does not make the specifications part of the plea.⁵

48. It is a sufficient compliance with an order, requiring the defendant to file a monthly account, on oath, of all "iron safes hereafter manufactured or sold by him," to give the inside dimensions of the safes, without stating the prices at which they are sold, or the names of the purchasers. It is sufficient so to describe the articles, that persons in the trade can determine their value in the market, with a view to the amount of the profits.⁶

49. Where the patentee of an invention has obtained a verdict against the defendant for infringing the patent, the Court will compel the defendant to render to the plaintiff an account of all articles made by him in imitation of the patented articles of the plaintiff, and to pay to the plaintiff a sum equal to the price of those which he had sold, and a

¹ *Silsby v. Foote*, 14 How. 218.

² *Hogg v. Emerson*, 11 How. 587.

³ *Wayne v. Winter*, 6 McLean, 344.

⁴ *Allen v. Blunt*, 3 Story, 742.

⁵ *Smith v. Ely*, 5 McLean, 76.

⁶ *Wilder v. Gayler*, 1 Blatch. 511.

further sum equal to the value of so many of such articles as the defendant has remaining in stock.¹

50. Under the patent law amendment act, 15 & 16 Vict. c. 83, where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. Neither does the act give power to order an inspection of the defendant's books, containing entries relating to such sales. But, upon reasonable evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, the defendant will be ordered to keep an account of all sales to be made of the article alleged to be an infringement of the plaintiff's patent, and of the profits thereon, until the further order of the Court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favor of the defendant, to pay to the defendant the expense of keeping such account.² And the 42d section of the 15 & 16 Vict. c. 83, enabling the Court, in which any action for the infringement of a patent is pending, "to make such order for an injunction, inspection, and account," as may to such Court seem fit; vests in the courts of common law the powers before exercised exclusively by courts of equity, and enables them to grant, either by interlocutory order, an account of all patent articles sold during the suit, or, after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required. But the Court has no power, where damages, nominal or substantial, have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the dam-

¹ *Holland v. Fox*, 25 Eng. L. & Eq. 69.

² *Vidi v. Smith*, 26 Eng. L. & Eq. 113.

ages assessed by the jury being considered as the compensation for the loss of such profits.¹

51. An action at law for the infringement of a patent was tried, and a verdict found for the plaintiff, and a motion for a new trial, on the grounds of errors in law at the trial, and of surprise in the exclusion of evidence, and of newly discovered evidence, was made and denied. After the verdict, the plaintiff filed a bill against the defendants for a perpetual injunction, founded on the verdict. An answer was put in, setting up in defence the matters urged as grounds for a new trial. After the refusal of a new trial, in the action at law, and after replication in the suit in equity, the defendants moved in the latter suit for a *feigned* issue, on the ground that they had just discovered new evidence, which went to show a want of novelty in the plaintiff's invention, and was of a different character from any before presented. Held, a proper case for a feigned issue. Also, that the defendants were entitled to amend their answer, on payment of costs, by inserting the newly discovered matter.²

52. The *jurisdiction* of the Circuit Courts, in patent cases, does not depend upon the citizenship of the parties, but upon the subject-matter. The eleventh section of the judiciary act of 1789 does not make it necessary, in such action, that either of the parties should be an inhabitant of the State where the suit is brought. It is sufficient to give jurisdiction, that the writ is served personally upon the defendant in the district in which the suit is brought.³ And where the alleged unlawful use of the machine was in Vermont, and the suit was brought in New York, it was held, that, for the purpose of restraining the use of the machine, it was only necessary for the Court to have jurisdiction of the person of the defendant. But, where it may be necessary to proceed directly against the machine itself, the proceedings must be instituted in the district in which the machine is located.⁴

¹ Holland v. Fox, 26 Eng. L. & Eq.
133.

² Foote v. Silsby, 1 Blatch. 545.

³ Allen v. Blunt, 1 Blatch. 480.

⁴ Wilson v. Sherman, Ib. 536.

53. Analogous to a patent, is a *copyright*. (a) By virtue of acts of Congress, the authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens of, or residents in the United States, are entitled to the exclusive right of printing and selling for twenty-eight years; and they (or their representatives, if dead,) for a renewed term of fourteen years. As in the case of patents, the law prescribes certain formalities, which must be strictly observed in order to secure this exclusive privilege, and which are substantially as follows: The party, before publication, must deposit a printed copy of the title of the book in the clerk's office of the District Court of the United States for the district where he at the time resides; and notice of the copyright must be given on the title-page or page next following. He must also deliver to such clerk a copy of the book within three months after publication. The former requisitions must, in case of renewal, be complied with within six months prior to the end of the first term, and the record of renewal must within two months be published in a newspaper. (b)

54. Whoever, by his own skill, labor, and judgment, writes

(a) In the United States, this privilege rests wholly upon the legislation of Congress. In England, the prevailing opinion, that authors had an exclusive copyright at common law, was first definitively settled in the case of *Miller v. Taylor*, 4 Burr. 2303. The Court, however, was divided in opinion, and the decision was reversed, in the case of *Donaldson v. Becket*, 4 Burr. 2408, 7 Bro. P. C. 83, by the House of Lords, who held, that the common-law right, if any, could not be exercised beyond the statutory period.

In a late case it is said, copyright did not exist at common law—it is the creature of statute. Per *Ld. Brougham*, *Jefferys v. Boosey*, 30 Eng. L. & Eq. 1.

The decision in *Donaldson v. Becket* was affirmed in the leading case of *Wheaton v. Peters*, 8 Pet. 591.

(b) Contrary to a previous decision, (*Nichols v. Ruggles*, 3 Day, 145,) it is held by the Supreme Court (*Wheaton v. Peters*, 8 Pet. 591) that an observance of all the requirements of the statute is necessary to the validity of the copyright.

a new work, may have a copyright therein, unless it be directly copied, or evasively imitated, from another work. So a new and original plan, arrangement, or combination of materials, will entitle the author to a copyright therein, whether the materials themselves be new or old. Thus the plaintiff wrote an arithmetic, the plan, arrangement, and illustration of which he claimed to be new. Held, the taking thereof was a violation of his copyright, although the materials and the several particulars of his plan had existed before in separate forms and in separate works.¹ So it is held, that some similarities, and some use of prior works, even to copying of small parts, are tolerated in some kinds of books; such as dictionaries of all descriptions, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopædias, itineraries, guide books, and similar publications. But a subsequent compiler must not use so much of the arrangement and materials of a prior compilation as to show a substantial invasion, and without novelty and improvement, so as to indicate no new toil and talent. The leading inquiry, in such a case, is, whether the book of the defendants, taken as a whole, is substantially a copy of the plaintiff's; whether it has substantially the same plan and motive throughout, and is intended to supersede the other in the market, with the same class of readers and purchasers, without introducing new matter, and with only colorable deviations. Thus, where the defendant's book, called the "Flower Vase" had, like the plaintiff's book, called "Flora's Interpreter," the class, order, and description of the flower placed on the same page with its name and interpretation, instead of being in notes at the end, as in a previous work, and where it copied *verbatim* about twenty definitions out of one hundred and forty-eight, consisting of one hundred and fifty-six words in the whole volume; and, in three or four instances, some of the significations were varied in form slightly, but not in substance; and, in nineteen cases, parts of the prose descriptions, &c., were

¹ Emerson v. Davies, 3 Story, 768.

the same; but it appeared that the plaintiff had also copied other matter from previous compilers in a similar manner; and that other novelties of the plaintiff's work were not copied by the defendant; and the defendant's work was in substance original, consisting chiefly of original poetry, was much smaller than the plaintiff's and sold at a less price: it was held, that the copying of such definitions did not, in itself, constitute a violation of the copyright; that, taken together with the copying of a new feature in the arrangement of the materials, such as the transfer of the notes from the end of the book above mentioned, both together might constitute an infringement, for which an action at law would lie; but they did not furnish sufficient ground for an injunction, especially where the arrangement pervaded the whole work, and could not be easily separated, and where there was no intention of piracy from the plaintiff's work.¹

55. An *abridgment* of, or *quotations* from a work, are lawful, although they may injure the sale of the original; but a *compilation* from a book is an infringement of the copyright.² In order to maintain an action, it must be shown that the defendant has published so much of the plaintiff's work as to be a substitute for it; or has extracted so much as to impart the same knowledge, whether in the form of an abridgment or review, or by incorporating it in some larger work, and has thus substantially diminished the value of the plaintiff's work.³ And the inquiry is said to be; whether the defendant's publication is a legitimate use of the plaintiff's, in the fair exercise of a mental operation, entitling it to the character of an original work.⁴ (a) And if one portion of a work,

¹ Webb v. Powers, 2 W. & M. 497.

² Story's, &c. v. Holcombe, 4 McLean, 306.

³ 2 Kent, 382; 2 Greenl. Ev. § 514;

Gray v. Russell, 1 Story, R. 11; Emerson v. Davies, 3 Story, R. 768.

⁴ Wilkins v. Aikin, 17 Ves. 422.

(a) The same conceptions, clothed in the same words, must necessarily be the same composition. 2 Bl. Comm. 406.

A *colorable*, not a *real* abridgment, is held to be a violation of copyright.

purporting to be an abridgment, is a compilation, and the rest a fair abridgment, an injunction will be granted against the former.¹

56. A prose *translation* (having no qualities of a paraphrase) of a copyright prose romance, which the author had herself caused to be translated in a way she liked, and copyrighted, is not an infringement of the copyright of the original.² (a)

57. Mere *industry* is held not to be ground for protection. Thus the publication of a *price current*, copied from a newspaper, is no infringement of copyright.³

58. A copyright cannot subsist in a *chart*, as a general subject, although it may in the individual work, and others may be restrained from copying such work. But the natural objects from which charts are made are open to the examination of all, and any one has a right to survey, and make a chart. Hence a right in a chart is violated, only when another copies from the chart of him who has secured the copyright, and thereby avails himself of his labor and skill. And where the first and subsequent charts are in all respects alike, it is a proper subject of inquiry for a jury,

¹ *Story's, &c. v. Holcombe*, 4 McLean, 306; *Webb v. Powers*, 2 W. & M. 497. ² *Clayton v. Stone*, 2 Paine, 382. See *Wyatt v. Barnard*, 3 Ves. & B. 77.

³ *Stowe v. Thomas*, 2 Wallace, Jr. 547.

Gyles v. Wilcox, 2 Atk. 141; *Lofft*, 775. An abridgment of Johnson's *Rasselas* was held not to be an invasion of the copyright. *Dodsley v. Kinnersley*, Amb. 403. See *Wilkins v. Aikin*, 17 Ves. 425; *Bramwell v. Holcomb*, 3 My. & Cr. 737; *Gray v. Russell*, 1 Story, R. 11; *Roworth v. Wilkes*, 1 Camp. 94.

Publication of a part of *Gray's Poems*, and of the *Paradise Lost*, was held an invasion of copyright. *Mason v. Murray*, 1 E. 361, 369.

Where a violation is clear, and the part copied can be easily separated, an injunction may be granted against that part. *Webb v. Powers*, 2 W. & M. 497.

(a) On the other hand, a copyright may be had in a translation, even though it be a gift from another. *Wyatt v. Barnard*, 3 Ves. & B. 77.

whether the latter is a copy of the former, or, if there is a slight variance, whether that is colorable or not; and in cases of doubt an injunction will not be granted, until after a trial at law. Thus in an action *qui tam*, for infringement of the copyright law in copying from the plaintiff's chart, drawn from a survey made at his expense—the position of George's Shoals; it was held, that the plaintiff had a right to the result of his labors and surveys; that the defendant might resort to the original materials of the chart, and survey for himself, but he could not avail himself, either in whole or in part, of the surveys of the plaintiff; and that it was a question for the jury whether the defendant had copied from the plaintiff's survey or not.¹ So *wood engravings*, printed in a book as illustrations of stories therein, and on the same sheet with the letter-press, are part of the book, and are protected by the copyright in the book; and it is not necessary that the name of the proprietor and the date of publication should be printed on each engraving, under the provisions of stat. 8 Geo. II. c. 18. And a piracy of such engravings will be restrained by injunction.²

59. Where a State statute required, that the copyright in the notes, &c. of *the reports of a court*, should be taken out by the secretary in the name and for the benefit of the State; and the secretary and reporter agreed with the plaintiffs to publish the reports, and transferred to them the exclusive benefit of the State's copyright in the matter furnished by the reporter; it was held, that the plaintiffs did not thereby acquire the title to the manuscript of a volume of reports, prepared by the reporter after he ceased to be such, though in part composed of decisions made while he was in office.³ But there may be a copyright in the marginal notes of a reporter.⁴ And where the defendants, proprietors of a periodical, professing to be an analytical digest of equity, common law, and other cases, copied verbatim the head or mar-

¹ *Blunt v. Patten*, 2 Paine, 393.

² *Bogue v. Houlston*, 10 Eng. L. & Eq. 215.

³ *Little v. Hall*, 18 How. 165.

⁴ *Wheaton v. Peters*, 8 Pet. 591.

ginal notes of cases from reports, the copyright of which was in the plaintiffs, without their consent; held, a piracy.¹ (*a*)

¹ *Sweet v. Benning*, 30 Eng. L. & Eq. 461.

(*a*) It seems, that, where the proprietors of a review employ persons to write in the review, the articles written must be paid for, in order to vest the copyright in the proprietors, under stat. 5 & 6 Vict. c. 45. *Richardson v. Gilbert*, 3 Eng. L. & Eq. 268.

By stat. 5 & 6 Vict. c. 45, § 18, where the proprietor of any periodical work shall employ any person to compose any article thereof, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor. Held, that these terms need not be expressed, but may be implied. *Sweet v. Benning*, 30 Eng. L. & Eq. 461.

And, where an author is employed by the proprietor of a periodical to write for it articles on certain terms as to price, but without any mention of the copyright, it is to be inferred that the copyright was to belong to such proprietor. *Ibid*.

In reference to copyright in *dramatic* compositions, the acting of a dramatic composition has been held no breach of copyright. *Coleman v. Wathen*, 5 T. R. 245. But it was held a breach, to take down, from the mouths of the actors, the words of a drama which the author had occasionally allowed to be acted, and publish it therefrom. *Macklin v. Richardson*, Amb. 694.

The prevailing rule has since been, that chancery will enjoin the acting of a drama without the author's consent. *Eden on Injunc.* 198. But it has been decided that an action at law cannot be maintained therefor. *Murray v. Elliston*, 5 B. & Ald. 657.

By the 3 and 4 Will. IV. c. 15, § 2, persons representing dramatic pieces, without the consent in writing of the author, are made liable to certain penalties. Held, that the consent need not be in the handwriting of the author, and may be given by any agent having due authority. If not limited in its terms, it may apply as well to dramas composed after it was given, as to those which were then in existence. *Morton v. Copeland*, 32 Eng. L. & Eq. 411.

The plaintiff was a member of the Dramatic Authors' Society, which published prospectuses and rules, announcing that leave might be obtained from the secretary to represent the pieces belonging to the members, at certain prices mentioned in a list, and that lists would be published from year to year containing the names of the new pieces. In 1849, the secretary of the society gave the defendant leave in writing, signed by himself, to play

60. In reference to the mutual rights and obligations of *authors* and *publishers*, more especially as to the *extent* and

"dramas belonging to the authors forming the Dramatic Authors' Society, upon his punctual transmission of the monthly bills, and payment of the prices for the performance of such dramas." In 1854, the defendant performed three pieces of the plaintiff's, which were composed after 1849, and had never been published in an annual list, the society having neglected to continue the publication of annual lists since 1846. Held, that the defendant was not liable to penalties; that the document given by the secretary in 1849 amounted, under the circumstances, to a "consent in writing of the author;" that it applied to dramas which might be composed by the plaintiff after its date as well as those composed before; and that the condition on which it was given was a condition subsequent and not precedent. *Ibid.*

A person who employs another to adapt a foreign dramatic piece for representation upon the English stage, and who has no other share in the design or execution of the work than that of suggesting the subject, is not "the author" of such adaptation within the meaning of stat. 3 and 4 Will. IV. c. 15; and therefore, when such employment is by parol, the employer has not the right of representing it, without an assignment in writing from the author. *Shepherd v. Conquest*, 33 Eng. L. & Eq. 255.

In England a class of cases is provided for by statute, somewhat intermediate between the two privileges usually termed *patent* and *copyright*.

The *copyright designs act*, 5 & 6 Vict. c. 100, § 4, excludes from the protection of the act the proprietor of any registered design applied to an article of manufacture, unless every such "article of manufacture" published by him has thereon the letters "Rd." One class of articles of manufacture mentioned in the statute is "paper-hangings." According to the usage of the trade, paper-hangings are sold for the purpose of papering rooms, in lengths of twelve yards, but it is also the practice of manufacturers to sell or otherwise issue, in the way of their trade, patterns of paper-hangings, in pieces of twenty-seven inches long, cut off from the lengths of twelve yards, and, where the design is a registered one, the practice is almost universal, of marking with the letters "Rd." each of those pattern pieces. Held, that such patterns were an "article of manufacture" within the meaning of the statute, and that a proprietor, who had issued them to the trade without such mark, was not entitled to recover against a party who had imitated the design. *Heywood v. Potter*, 16 Eng. L. & Eq. 242.

By 6 & 7 Vict. c. 65, a limited copyright is granted for "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration

permanency of the privilege acquired by the latter by contracts made with the former, it is held that the construction of all

of such article," provided such design is registered. A newly-invented brick, the utility of which consisted in its being so shaped that, when several bricks were laid together in building, a series of apertures were left in the wall, by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute. *Rogers v. Driver*, 1 Eng. L. & Eq. 269.

Questions often arise in England, in reference to the copyright privileges of *foreigners*. The English statute, unlike the act of Congress, did not discriminate between natives and foreigners. But if an author first publishes abroad, and does not use due diligence to publish in England, and another fairly publishes his work in England; it is held, that he cannot sue for a breach of copyright. 2 Kent, 379.

In 1844, the plaintiff purchased the English copyright of some musical compositions by Mendelssohn. In August of that year, the plaintiff published this music in England, and it was published simultaneously in Berlin. In 1849, there being then conflicting decisions on the question of foreign copyright in England, the defendant published the music on his own account. The plaintiff thereupon gave the defendant notice to desist from such publication, or that he would take legal proceedings against him. The defendant paid no regard to such notice. The plaintiff delayed to proceed against him. In May, 1851, the Appeal Court of the Exchequer Chamber decided in favor of the foreign copyright. The plaintiff thereupon gave another notice to the defendant to desist, and, upon his disregarding it, filed this bill for an injunction. On motion, the injunction was granted, and the plaintiff was put on terms to bring an action to try his right, if the defendant required him. *Buxton v. James*, 8 Eng. L. & Eq. 155.

An alien author first published a literary work while resident in England. A pirated edition of the same work was published at Frankfort-on-the-Main, and copies were imported into England, and sold by a London bookseller. The alien filed a bill for an injunction to restrain the sale, and, on motion, the same was granted, the plaintiff undertaking to bring an action if the defendants desired it. *Ollendorff v. Black*, 1 Eng. L. & Eq. 114.

A charge of piracy of an English book cannot be rebutted by showing that the part complained of was copied from a foreign book, which foreign book appeared to be copied from the English book. *Murray v. Bogue*, 17 Eng. L. & Eq. 165.

A. published a guide-book, partly original, partly compiled, and B., who had never been in the country described, was employed by C. to write a guide-book to the same country, and compiled his book partly from foreign

contracts and laws in respect to copyrights should be favorable to authors, as the laws were intended for their benefit; and, when they assign their rights to others, no more must be considered as passing, than was contemplated at the time by the parties, and paid for, and clearly indicated in the contract. Thus, where A. employed B. to compile a school-book, gave him some suggestions as to its character and form, and agreed to give him \$500; and B. conveyed to A. the copyright, and the book was published by A., calling B. the author on the

works and partly from original manuscript, and appeared to have used A.'s work, but not unfairly. Held, C. could not be restrained from publishing the guide-book of A. *Ibid.*

The proprietor of a foreign print cannot claim copyright therein under the international copyright act, 7 and 8 Vict. c. 12, unless the date of publication and name of the proprietor are engraved on the plate, and printed on the print, as required by the 8 Geo. II. c. 13. *Avanzo v. Madie*, 28 Eng. L. & Eq. 572.

The object of the statute of Anne, c. 19, was to encourage literature among British subjects, which description includes such foreigners, as, by residence here, owe the crown a temporary allegiance; and any such foreigner, first publishing his work in England, is an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication. *Jefferys v. Boosey*, 30 Eng. L. & Eq. 1. See 4 *Ib.* 479.

Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect. *Ibid.*

An Englishman, though resident abroad, will have copyright in a work of his own, first published in England. *Ibid.*

B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to England, and, before publication, assigned it, according to the forms required by the law of the country, to an Englishman. The first publication took place in the country. Held, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of the country, any assignable copyright here in this musical composition. *Ibid.*

title-page ; held, only the usual copyright for fourteen years passed under the contract, and the author, being alive at the end thereof, had the sole interest in the additional term then allowed to authors in such cases ; and that a usage among booksellers, to consider the second term as passing with the first, did not control the rights of B., who was not a bookseller, nor shown to be conversant of such usage.¹

61. A., an author, agreed with B., a publisher, in writing, but not under seal, that he should have the exclusive right to print and publish an edition of one thousand copies of his work, paying A. fifteen cents for each copy sold ; and, if B. should find a second edition called for, A. was to revise a copy of the first edition, which B. was to stereotype at his own expense, having the exclusive control of the plates, printing as many copies as he could sell, and paying to A. twenty cents for each copy sold. B. took out a copyright in his own name, with the knowledge and consent of A. The first edition being sold, B. called for a revised copy, which was furnished by A., and stereotype plates were prepared. A second edition of fifteen hundred copies was printed ; and, subsequently, two thousand copies more were published, called in the title-page the third edition. The plates were then transferred to C., of another State, to publish, and account to B., on the same terms as those of the contract between A. and B. A. filed a bill against B. and C., alleging that the third edition was contrary to his wishes and in fraud of his rights, and praying for an injunction to prevent their further printing or selling the third edition. The defendants filed a cross bill, alleging the copyright to be vested in them, and praying that A. might be enjoined from publishing the book as he was about to do. Held, that, as the contract did not purport to convey the copyright, but only secured to B. the exclusive right to publish the work, it did not require a seal ; that the copyright secured by B. only protected his interest, so long as he published the work according to the

¹ *Pierpont v. Fowle*, 2 W. & M. 23.

contract; that B. was bound to print as many copies as he could sell; that, though he could not transfer the copyright, yet he might sell the plates to C., and authorize him to publish, still accounting to A. as stipulated in the agreement; that the second edition was not limited to the number of copies that might be struck off at one impression, but that B. could increase the number as demanded by the sales, and the mere fact, of inserting in the title-page of the third impression the "third edition," was immaterial; and that A. had no right to publish the work in disregard of the contract, which covered the entire printing and publishing of it.¹

62. An author agreed with publishers to prepare a work, correct proofs, &c., the publishers to pay the expenses, and the profits to be divided equally; if subsequent editions should be called for, the author was to make all necessary alterations, and the publishers were to print and publish on the same conditions; the account to be finally settled at the end of five years. Two editions were published. One of the publishers retired, and a new partner was taken in. One of the new firm became bankrupt, and, by two instruments, all the interest of the new firm in the work, and the unsold copies, were assigned to the plaintiffs. A third edition was prepared by the author, and published by another publisher, and the plaintiffs filed a bill, praying an injunction and other relief. Held, the agreement between the author and original publishers was not an assignment of the copyright, but was of a personal nature, involving mutual duties and obligations, and not one that could be assigned without the author's consent. Injunction refused.²

63. In reference to the *registration* of a copyright; where the first edition of a book had been published before the copyright act was passed, but subsequent editions had not been registered; it was held, that such parts of the book as

¹ *Pulte v. Derby*, 5 McLean, 328.

² *Stevens v. Benning*, 31 Eng. L. & Eq. 283.

were in the first edition were protected, but that no suit could be maintained as to the parts introduced in the subsequent editions.¹

64. A copyright may be *assigned*.² Although the law requires that the assignment, as well as original grant, of a copyright, be recorded; in a suit in equity for the violation of a copyright, brought by the assignees thereof, the assignments, though not recorded, are still valid as between the parties, and as to all persons, like the defendants, not claiming under the assignors.³ And there may be an equitable assignment, which a court of equity will notice and enforce. Thus the defendant, by an instrument in writing, not sealed or attested, so as to pass a legal copyright, agreed to assign a copyright to A. for £300, with a stipulation that a deed should be executed. The price being duly paid by A., held, the effect was to vest the equitable copyright in A., who would be entitled to a decree for specific performance, and that the plaintiff was consequently entitled to succeed, upon issues denying the defendant's title to grant the copyright, and alleging that A. was equitably the proprietor thereof, and had the sole right to grant permission to publish.⁴ (a)

65. In reference to the implied obligation or liability involved in the assignment of a copyright, the defendant, having been applied to by the plaintiff for permission to publish a work, wrote to him as follows: "You formerly made me

¹ Murray v. Bogue, 17 Eng. L. & Eq. 165.

² Webb v. Powers, 2 W. & M. 497.

³ Simms v. Marryat, 7 Eng. L. & Eq. 330.

⁴ See Jefferys v. Boosey, 30 Ib. 1. Eq. 330.

(a) An execution purchaser does not acquire the rights of an assignee of the copyright of the article sold on execution. Thus a seizure and sale on execution of the engraved plate of a map, for which the debtor has obtained a copyright, does not transfer the copyright to the purchaser; and the debtor is entitled, without reimbursing to the purchaser the money paid by the latter on such sale, to an injunction, to restrain the purchaser from striking off and selling copies of the map. Stephens v. Cady, 14 How. 528; Stevens v. Gladding, 17 How. 447.

an offer of £50 for the exclusive right of publishing, for ten years, Captain M.'s work, 'Monsieur Violet,' which offer I accepted and wrote to you to that effect. I possess but few of the copyrights of the earlier portions of Captain M.'s works, and they are many of them published in a cheap edition. I will let you know in a few days those of the works that belong to me, that I feel disposed to offer to you. In the mean time, I shall be glad to know if you received my last letter, accepting your offer for 'Monsieur Violet,' and if not, whether you hold the same proposal." The £50 was afterwards paid, for which the defendant gave a receipt to the plaintiff, expressed to be "for permission to publish Captain M.'s work, 'Monsieur Violet,' so long as the copyright may endure, that right to be exclusively his own for ten years." Held, an express warranty by the defendant, that he had the title to the copyright.¹

66. As in case of patents, the most natural and effectual remedy for violation of copyright is in a Court of Equity. A bill in chancery, asking a disclosure and an account of sales, under the disposal of a copyright alleged to belong to the complainant, and praying an injunction against further sales, gives, on its face, jurisdiction appropriate to chancery, and about which a remedy at law would not be so complete as accounting here, and an injunction.² An injunction as a preventive remedy is more ample and appropriate than a suit at law; and hence, when it is asked, and an account and disclosure of facts desired, they will be required, in order to settle the question in controversy. But chancery cannot grant relief, on the ground that a right exists, which the party has failed to redress at law; but proper matters for the exercise of its jurisdiction must be set out and sustained.³ And, if no benefit or advantage whatever appears to be gained by proceedings in equity rather than at law, the bill will be dismissed without prejudice, in order that the rights

¹ *Simms v. Maryatt*, 7 Eng. L. & Eq. 330.

² *Pierpont v. Fowle*, 2 W. & M. 23.

³ *Stevens v. Gladding*, 17 How. 447; — *v. Cady*, 2 Curt. 200.

of the parties may be adjusted at law. In England, where the power in chancery is concurrent with that at law, the former may, in its discretion, proceed to act in it; but in the Circuit Court it is otherwise, under the judiciary act of 1789, if the remedy be as full and perfect at law as in chancery; and the objection may sometimes be taken here under the answer, and at the hearing, as well as by demurrer.¹ But where the title to the copyright under a contract of sale is also in dispute, this question may be settled in chancery, rather than send the parties to the law side of the court.²

67. Chancery will not decree payment of a statute penalty. (a) But *commissions* must be accounted for.³

68. In addition to the privilege of copyright, an author has a common-law right of property in his *manuscripts*, which will be protected by a court of equity, though, if he publishes his work, he dedicates it to the public, and cannot, by the common law, claim the exclusive right to republish it. The right of property in manuscripts is also

¹ *Stevens v. Gladding*, 17 How. 447; ² *Ibid.*
 — *v. Cady*, 2 Curt. 200. ³ *Ibid.* 608.

(a) Under § 6 of the act of Congress of February 3, 1831, the penalty of fifty cents, for violation of a copyright, on each sheet, whether printed or being printed, or published, or exposed to sale, does not apply to those sheets which a party had published or procured to be published, whether they were found in his possession or not; but is limited to the sheets in the possession of the party who prints or exposes them to sale. *Backus v. Gould*, 7 How. 798.

The 5 & 6 Vict. c. 45, § 2, declares the word "copyright" to mean "the sole and exclusive liberty of printing or otherwise multiplying copies" of any book, and the 3d and 4th section defines the terms for which such copyright is to exist. The 15th section provides, that, if any one print or cause to be printed, either for sale or for exportation, any book in which there is existing copyright, such offender shall be liable to a special action on the case. Held, that this provision does not restrict the right conferred by the previous sections of the act, and that the owner of copyright is entitled, by common law, to his remedy by action for the infringement of that right. *Novelli v. Sudlow*, 11 Eng. L. & Eq. 492.

protected by § 9 of the copyright act of 1831 ; and, if the whole or an important part of a work be taken and printed, chancery will enjoin its publication, on the application of the author or his legal representatives. So private letters are within the statute.¹ But a court of equity has no jurisdiction to restrain the publication of private letters, although published with the view of wounding the feelings of individuals, or of gratifying a perverted public taste, when the letters are of no value to the author as literary property ; and they cannot be considered of such value to the author, when he would not willingly consent to have them published. And a court of equity will not restrain the publication of letters, upon the application of the person to whom they were written, but who has no authority, express or implied, to publish them.² So, although by sending a letter the writer does not give the receiver a right to publish it ; in general, chancery will not enjoin the publication of *commercial* or *friendly* letters ;³ unless the publication would be a breach of trust.⁴ (a)

64. The *novelty* of a work on *book-keeping* consists solely in the mode of keeping accounts—the names used in the items of debit and credit being of no importance. And it is no objection to the enjoining of its publication, without the authority of its author, that the manuscript does not contain a complete system of book-keeping.⁵

65. Property in a manuscript may be transferred or abandoned by the author, like any other property. But one who permits pupils to take copies of his manuscripts, for

¹ Bartlett v. Crittenden, 5 McLean, 32.

² Hoyt v. Mackenzie, 3 Barb. Ch. 320.

³ Percival v. Phipps, 2 Ves. & B. 19 ; Wetmore v. Scovell, 3 Edw. 515.

⁴ 2 Ves. & B. 27 ; Granard v. Dunkin. 1 Ball & B. 209 ; Gee v. Pritchard, 2 Swanst. 418. See 2 Story's Eq. 220-223.

⁵ Bartlett v. Crittenden, 5 McLean, 32.

(a) In England, an injunction was granted against the publication of the letters of Pope, Swift, and Burns. Pope v. Curl, 2 Atk. 342 ; Thompson v. Stanhope, Amb. 737 ; Cadell v. Stewart, 1 Bell's Com. 116 n.

the purpose of instructing themselves and others, does not thereby abandon them to the public; and the publication of them will be restrained by injunction.¹ (a)

66. A patent or copyright, as has been seen, is a positive or conventional privilege, derived from the government of the State. There is another somewhat analogous right, to which we have already briefly referred, (see i. 86,) not depending on any public grant, but wholly on the party's own private labor or skill; which, however, the law equally protects and vindicates. This is commonly called a *trade-mark*. (b) A manufacturer or a merchant for whom goods are manufactured may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish the manufactures, acquire a property therein, as a trade-mark, for the invasion of which an action for damages will lie, and in the exclusive use of which he may have protection, when necessary, by injunction. In all cases where names, signs, marks, brands, labels, words or devices of any kind can be advantageously used to designate the goods or property, or particular place of business, of a person engaged in trade or manufactures, or any similar business, he may adopt and use such as he pleases, which have not been before appropriated; and no other can lawfully imitate them, and by that means sell his own goods or property, or carry on his business, as the goods, property, or business of the

¹ 2 Kent, 378.

(a) The English statute expressly prohibits such publication.

(b) See *Sykes v. Sykes*, 3 B. & C. 541; *Blofield v. Payne*, 4 B. & Ad. 410; *Knott v. Morgan*, 2 Keen, 213; *Morison v. Salmon*, 2 Man. & G. 385; *Stone v. Carlan*, 13 Law Rep. 360.

former.¹ The object of this privilege is, that the goods may be known as his mark in the market for which he intends them, and that he may thus secure the profits which their superior repute as his may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. Hence his own as well as the public interest requires, that he should be protected in the exclusive use of his trade-mark. And he who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use the profits, to which the superior skill of another has given him the exclusive title. Such act is a fraud upon the public and upon the owner of the trade-mark.²

67. An imitation is colorable, and will be enjoined, where it requires a careful inspection to distinguish it from the genuine article. On a bill to restrain one from the use of trade-marks, the question is not, whether the complainant was the original inventor of the mark; nor whether the article sold under the pirated mark is of equal value with the genuine; but the ground is, that the complainant has an interest in the good-will of his trade or business, and, having taken a particular label, or sign, indicating that the article sold under it was made by him, and sold under his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to pirate upon the good-will of his friends or customers, by using such label, or sign, without his consent or authority.³ And where one intentionally uses, or closely imitates, another's trade-marks on merchandise or manufactures, the law presumes that he did it fraudulently, for the purpose of inducing the public, or those dealing in the article, to believe that

¹ *Stokes v. Landgraff*, 17 Barb. 608; B. 109; *Sykes v. Sykes*, 3 B. & C. 2 Sandf. 599.

² *Amoskeag, &c. v. Spear*, 2 Sandf.

³ *Partridge v. Menck*, 2 Sandf. Ch. 599. *Acc. Rogers v. Nowill*, 5 Com. 622; 2 Barb. 101.

the goods are those made and sold by the latter, and of supplanting him in the good-will of his trade or business.¹

68. An imitation may be only *partial*; and, where it is so, if calculated to mislead the public, and manifestly intended for that purpose; and if the imitation is such, that the success of the design is a probable or even possible consequence; an injunction will be granted. So where the public is in fact misled, whether intentionally or otherwise, by the imitation of signs or symbols, which the party who first used them had a right to appropriate.²

69. As has been seen, upon the ground that in this class of cases there is a joint fraud and damage, for which there is no adequate remedy at law, an *injunction* will lie to restrain one in the use of the trade-mark of another,³ accompanied by an account for damages, and costs of suit.⁴ And where the person pirates a trade-mark, for the fraudulent purpose of passing off his own article for that of him whose mark he has taken, and to supplant him in the good-will of the business, he will be liable also to respond in damages for the injury thus caused.⁵ But it is to be further observed, that, in granting an injunction in such case, great caution will be used; and it will not be granted where the legal title is doubtful, or where it would tend to create a monopoly.⁶ Where the case is one of doubt as to the piracy, an injunction should not be granted until the cause is heard on pleadings and proofs, or until the complainant has established his right by an action at law.⁷ Thus, on a bill to restrain the defendant from selling an almanac, alleged to be a fraudulent imitation of the complainant's; it was held, that, the case not being clear as to the legal right, and the defendant undertaking to keep an account of his sales, the

¹ Taylor v. Carpenter, 2 Sandf. 603.

⁵ 11 Paige, 292.

² Amoskeag, &c. v. Spear, 2 Sandf. 599.

⁶ Amoskeag, &c. v. Spear, 2 Sandf. 599.

³ Ibid.

⁷ Partridge v. Menck, 2 Sandf. Ch. 622.

⁴ Coats v. Holbrook, 2 Sandf. Ch. 586; Taylor v. Carpenter, Ib. 603; 11 Paige, 292.

injunction ought not to be retained.¹ And in all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and it is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that the party appealing to a court of justice can be entitled to relief. And, where an injunction is granted, it ought to be only to the extent to which the false representation is directly or indirectly made.² So, if the marks used by the defendants, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, paying the attention which such persons usually do in buying the article in question; an injunction will not be granted.³ And it is not enough to authorize an injunction, that the public are misled by a trade-mark imitated; the imitation must be of some mark or sign which a person has a right to appropriate. Thus a party cannot acquire an exclusive right to the use of *the letters of the alphabet*, to designate the quality of an article.⁴ And in letters, words, marks, devices, figures, or symbols, which do not indicate the origin or ownership of the goods or property, or particular place of business, of a person, but only the name, nature, kind, or quality of the articles, in which he deals; no property can be acquired.⁵ So, where the manufacturer of an article sells it under his own name, he does not thereby acquire such an exclusive right in the use of the name or title, as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself.⁶ And the plaintiff's long *acquiescence* in the use of his private marks is sometimes relied on, as a defence against a claim for relief in equity. Upon this subject it is held, that acquiescence on the part of the plaintiffs, who have obtained an

¹ Spottiswoode v. Clark, 2 Sandf. Ch. 628.

² Amoskeag, &c. v. Spear, Ib. 599.

³ Partridge v. Menck, Ib. 622.

⁴ Amoskeag, &c. v. Spear, Ib. 599.

⁵ Stokes v. Landgraaf, 17 Barb. 608.

⁶ Burgess v. Burgess, 17 Eng. L. & Eq. 257.

injunction, in order to constitute a valid defence to a motion to commit for breach of the injunction, must be such as to amount almost to a license to use the trade-mark. But where the plaintiffs had obtained an injunction, to restrain a defendant from using one of twelve trade-marks, which they stated were all their peculiar marks, all such marks being a common name, with various additions; and the defendant, after the decree, had entered into a partnership bearing that name, which was the principal part of the prohibited mark; and that partnership used the prohibited mark for five years without interruption by the plaintiffs; the Court refused a motion to commit, but without costs.¹

70. With reference to the parties, by and against whom this rule of law may be enforced; it is held that an *alien* manufacturer may maintain a bill for an injunction, against a citizen of the United States, using his trade-mark.² (a)

71. A commission merchant, who sells a spurious article, knowing its character, is liable to a suit to restrain its further sale, by the proprietor of the trade-mark, and will be subjected to the costs of such suit.³

72. It is held no defence to a suit for assuming a trade-mark, that the simulated article is equal in quality to the genuine.⁴ (b) Nor that the maker of the spurious goods,

¹ *Rodgers v. Nowill*, 17 Eng. L. & Eq. 83.

² *Coats v. Holbrook*, 2 Sandf. Ch. 586.

³ *Taylor v. Carpenter*, 11 Paige, 292; 2 W. & M. 1.

⁴ *Ibid*; *Partridge v. Menck*, 2 Sandf. 622; *Taylor v. Carpenter*, 11 Paige, 293.

(a) The plaintiff's father prepared and sold a medicine called "Dr. Johnson's Yellow Ointment," for which no patent had been obtained; and the plaintiff, after his father's death, continued to sell the same. The defendant having sold a medicine under the same name and mark; held, no action could be maintained against him by the plaintiff. *Singleton v. Bolton*, 3 Doug. 293.

(b) Upon this point the following distinctions are made. If a druggist

or the jobber who sells them to the retailers, informs those who purchase, that the article is spurious, or an imitation.¹

73. Where an action is brought for deceit in using the plaintiff's trade-marks on the defendant's goods, and selling them as and for the plaintiff's, evidence may be offered of any number of such sales, under a count for selling on a particular day, and divers other days between that and the date of the writ.²

74. The same general principle has been applied in other cases than those of strictly trade-marks. Thus, where the proprietor of a hotel had established a high reputation for his house under a certain name, and the same name was used by another person for another house; it was held, that the latter could be enjoined against using such name, as the case came within the principle which made trade-marks personal property.³ (a) But, in a late case, the declaration

¹ *Coats v. Holbrook*, 2 Sandf. Ch. 586.

² *Taylor v. Carpenter*, 2 W. & M. 1.

³ *Howard v. Henriques*, 3 Sandf. 725.

prepares a certain kind of medicine, and designates it by the name of a superior medicine, invented, prepared, and sold by the plaintiff, and sells it as and for the medicine prepared by the plaintiff; the plaintiff may maintain an action against him, without proof of special damage. But where certain medicines are designated by the name of the inventor, as a *generic term*, descriptive of a kind or class, the inventor is not entitled to the exclusive right of compounding or vending them, unless he has obtained a patent therefor; and if another person prepares such medicines of an inferior quality, and sells them, and by this means all medicines of that class are brought into disrepute, such inventor can maintain no action for any loss sustained by him, in consequence thereof, unless they are sold as and for medicines prepared by him. *Thomson v. Winchester*, 19 Pick. 214.

(a) In a case of this nature, already referred to, (vol. i. p. 86,) for assuming the badge of an *omnibus*, connected with a particular hotel, the following observations were made by the Court, which well illustrate the general principle of the injury referred to:—

“Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads of the city, have a knowledge of the reputation and character of the principal hotels, and would at once trust

stated, that the plaintiff had established a bank in London, called "The Bank of London," and was the first person who had established a bank by or under that name, and had established it at great expense, and caused the name to be published and affixed on the offices of the bank, so that the same might be seen and known by the public, and had caused prospectuses of the bank to be printed and circulated with the said name and title of "The Bank of London" thereon, and the said bank was then commonly known by the name of, and was the only bank named or styled "The Bank of London;" whereby the plaintiff had acquired and was acquiring great gains and profits. It then proceeded to

themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out, falsely, as being in the employment, or as having the patronage and countenance of the keepers of well-known and respectable public houses. The plaintiffs do not claim the exclusive right of using the words "Revere House;" but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact. The defendants have a perfect right to carry on as active and as energetic a competition as they please. They may obtain the public patronage by the excellence of the carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols which belong to others." Per Fletcher, J., *Marsh v. Billings*, 7 Cush. 330-332.

In Massachusetts, an express statute (1852, c. 197) forbids the use of another's trade-marks. But a bill in equity to restrain the use of trade-marks cannot be maintained, under this statute, without alleging and proving that such use was for the purpose of falsely representing the articles marked to be manufactured by the plaintiff. *Ames v. King*, 2 Gray, 379. See Stat. 1859, c. 234.

allege that the defendants, intending to injure the plaintiff in his said bank, and the said business of his said bank, afterwards, and while his said bank was the only bank named or styled "The Bank of London," wrongfully and fraudulently established a certain other bank in London, under the name, style, and title of "The Bank of London," in imitation of, and as representing, the said Bank of London of the plaintiff, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under the false color and pretence that the same was the bank established by the plaintiff; and that thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him, so fully and extensively as he would otherwise have done, and had been deprived of profits; and that by means of the premises divers persons were induced to believe, and did believe, that the bank so established by the defendants was the bank called "The Bank of London" established by the plaintiff. Held, that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker. And it was doubted whether an action of this description will lie against a trading corporation.¹

¹ *Lawson v. The Bank of London*, 18 Com. B. 84.

CHAPTER XV.

TRESPASS.

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| 1. Definition, and distinction from other analogous wrongs; how far a wrongful taking or entry is necessary.
6. Parties.
7. Pleadings; declaration; <i>liberum tenementum</i> , <i>license</i> , &c. | 13. General defence, of property in the defendant.
15. Damages.
17. Trespass upon a dwelling-house; breaking of doors; search-warrant, &c. |
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1. HAVING completed our view of that class of injuries, coming under the general, technical head of *Nuisance*; we proceed to the consideration of another comprehensive class, viz., *Trespass*. Trespass is defined¹ as "an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another." It is also said,² that "trespass in the most extensive sense means any injury arising to another's person or property from the misfeasance or act of another." And the still more extensive definition is given by Blackstone;³ "trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person or his property. Therefore, beating another is a trespass; taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law; so also non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded; and, in general, any misfeasance, or act of one man whereby another

¹ Bouv. Law Dict.² 3 Steph. N. P. 2629.³ 3 Comm. 208.

is injuriously treated or damnified, is a transgression, or trespass in its largest sense." (a)

2. As already explained, however, trespass, in its strict and technical sense, is a wrongful entry upon or taking of real or personal property, of a corporeal and tangible nature. The respective branches of this definition distinguish it from a mere *conversion*, (ch. 16,) on the one hand, which is the subject of the action of trover; and from *nuisance*, on the other, for which the remedy is an action on the case. In our introductory view of torts or wrongs, generally, (see chapters 3 and 4,) we have of course treated these various injuries somewhat promiscuously, the same principles being for the most part applicable to them all. We have also treated at length the subject of trespass to the person. (See chapter 5.) A comparatively brief view, therefore, will be sufficient, of the precise injury which the law terms a trespass, including trespass *quare clausum fregit* and trespass *de bonis asportatis*. (b)

(a) It is perhaps worthy of notice, that this enlarged sense of the word has received the sanction of *the Divine Law*, both in the code promulgated by Moses, so constantly reiterating the comprehensive formula "if thy brother trespass," and in the brief and simple form of prayer taught by a higher than Moses, where *debts* and *trespasses*—in the Latin version, *debita* on the one hand, and *peccata, lapsus, offensas*, on the other—are synonymously and promiscuously used.

If, in an action of trespass, the facts attempted to be proved do not in law amount to a trespass, the Court should, on the defendant's motion, so inform the jury. *Crookshank v. Kellogg*, 8 Blackf. 256.

But the Court cannot, in an action of trespass *quare clausum*, draw the legal conclusion, that the acts of the defendants were a wanton trespass, from the fact that they entered without a license from the real owners. The question as to their motives is for the jury. *Longfellow v. Quimby*, 29 Maine, 186.

And where goods were distrained in a house, and the person left in possession till they were replevied suffered them to remain dispersed, as he found them, over the house, and went into all parts of it himself, no objection being made at the time; Lord Mansfield left it to the jury, in an action of trespass, as evidence of the owner's consent. *Washborn v. Black*, 11 E. 405.

(b) With the few differences necessarily arising from the diverse nature

3. The following distinctions may be noticed between the action of trespass and other remedies for the same injury.

of real and personal estate, these actions are governed by the same general rules. Thus they may be joined in one writ and even one count.

Thus a count in trespass *de bon. aspor.*, for breaking down and carrying away the plaintiff's lime-kiln, may be joined with trespass *qu. claus.* *Heimar v. Wilcox*, 1 Cart. 29.

But a count for breaking and entering the plaintiff's dwelling-house, and taking and carrying away goods therefrom, is not supported by proving a trespass in taking and carrying away goods only. *Eames v. Prentice*, 8 Cush. 337.

But where the declaration contains but one count, to wit, for breaking the plaintiff's close and taking and carrying away his goods; he may amend, by filing a count simply for the same taking and carrying away of the same goods. *Bishop v. Baker*, 19 Pick. 117.

And where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action; actions of trespass, except those for injury to real property, being *transitory*. *McKenna v. Fisk*, 1 How. U. S. 241; S. C. 17 Pet. 245.

On the trial of an action of trespass *qu. claus. et de bon. aspor.*, the great questions related to the title of the personal property, and the damages claimed had reference to it alone. The cause was submitted to the jury, under a charge which, if erroneous at all, was so as to certain questions relating to a breach of the plaintiff's close, and, even as to these, was favorable to the defendant. Held, after verdict for the plaintiff, that a new trial ought not to be granted. *Holly v. Brown*, 14 Conn. 255.

Questions sometimes arise, in reference to injuries committed upon property partaking of the character both of real and personal estate. (See chap. 9.)

If a man cut and carry away corn at the same time, it is trespass only and not felony, because it is but one act; but if he cut it and lay it by, and carry it away afterwards, it is felony. *Emmerson v. Annison*, 1 Mod. 89, 90.

The entering upon real estate, and severing a part therefrom and carrying it away, by one continuous act, can be recovered for only by an action of trespass *qu. claus.* *Sturgis v. Warren*, 11 Verm. 433.

And similar questions may arise as to other articles in the nature of *fixtures*. Thus the plaintiff hired of the defendant certain rooms in the house of the defendant at a yearly rent, with the privilege of putting a brass plate, with the plaintiff's name engraved thereon, upon the front-door, there to

4. It is held that a trespass on the land of another will not amount to an *ouster*, without a knowledge thereof by the owner, either express or implied.¹

¹. *Pray v. Pierce*, 7 Mass. 381.

remain so long as the plaintiff should continue to occupy the apartments. The rent being in arrear, the defendant removed the brass plate from the door, and refused to allow the plaintiff to have access to the apartments. In trespass, charging that the defendant broke and entered the apartments of the plaintiff, and expelled him therefrom, and removed the plate, and seized and converted his goods, the defendant, amongst other pleas, pleaded that the plaintiff was not possessed of the brass plate. Held, that the facts warranted the jury in finding that the defendant was guilty of breaking and entering the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to show that it was affixed to the freehold, it must be assumed to be a chattel only. *Lane v. Dixon*, 3 Com. B. 776.

In answer to an action of tort, commenced in the Court of Common Pleas in Massachusetts, for pulling down, taking, and carrying away "a wooden building, parcel of an estate, consisting of land and buildings thereon, standing there in the occupation of the defendant, as tenant for term of years, the reversion whereof belonged to the plaintiffs," the defendant admits that he pulled down and removed the building, "but whether the same belonged to the plaintiff he has no knowledge and can neither admit nor deny, but leaves the plaintiff to prove," and justifies the removal. Held, that the action, if not an action of trespass to real estate, (which it seems it was,) was an action in which the title to real estate was concerned, and that the plaintiff was therefore entitled to full costs if he prevailed, although he recovered not exceeding twenty dollars damages. *Willard v. Baker*, 2 Gray, 336.

As already stated, an *assault* is a *trespass* to the person, and therefore may be joined in an action even of trespass *qu. claus.* To an action of tort, brought by husband and wife for breaking and entering their close and injuring the wife, the defendant pleaded soil and freehold in himself, and a receipt in full of all demands. The judge instructed the jury, that the plaintiffs jointly could not maintain this action as an action of trespass *qu. claus.*, but might recover for any personal injury to the wife; and the issue under this ruling was the only one submitted to the jury, who returned a verdict for the plaintiffs for twenty dollars. Held, the title to real estate was not brought in question, and the plaintiffs were therefore entitled for their costs, under Rev. Sts. c. 121, § 3, to no more than one quarter part of the damage. *Robbins v. Sawyer*, 3 Gray, 375.

5. In reference to the two actions of trespass and *trover*, (see ch. 16,) it is held that trespass and trover are different actions in their very nature. Trover lies upon a demand and refusal, but trespass does not. Hence a judgment in trespass is not necessarily a bar to an action of trover for the same goods. Thus if, in trespass for taking cattle, the defendant justifies for a heriot, and obtains a verdict; yet, if it appear that the plaintiff mistook the nature of his action, and that he ought to have brought trover instead of trespass, this recovery cannot be pleaded in bar to trover for the cattle.¹ And the general rule is, that trespass will not lie, against a person coming to the possession of goods lawfully, for the subsequent unlawful conversion.² So it is held that, where a right to enter on land exists, its abuse is not a trespass.³ (a) So where the defendant, claiming rent in arrear from the plaintiff, his lodger, locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent; held, the acts of the defendant did not amount to a taking, and trespass was not maintainable.⁴ And where one of two partners made a general assignment, in the name of the firm, of all the partnership property, in trust for the payment of the debts of the company, and delivered the property to the assignee; and the other partner, who was under age, ratified the

¹ *Putt v. Boyster*, 2 Mod. 319; 3 Mod. 1.

² *Edelman v. Yeakel*, 27 Penn. 26.

³ *Bradley v. Davis*, 2 Shep. 44.

⁴ *Hartley v. Moxham*, 3 Gale & Dav. 1; 3 Ad. & Ell. N. S. 701.

(a) See *Trespass ab initio*, (i. 114).

After a delivery of goods sold, the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring trespass against a person taking them away. *M'Carty v. Vickery*, 12 Johns. 848.

So one who receives goods as a warehouseman, from one who obtained them by the commission of a trespass, and on demand refuses to deliver them to the owner, is not liable in trespass. Trover, or detinue, is the appropriate action. *Prince v. Puckett*, 12 Ala. 832.

assignment, but on coming of age he brought an action of trespass against the assignee, for the alleged unlawful taking and asportation of the property; held, trespass would not lie.¹ But, to maintain trespass *de bon. aspor.*, evidence of a forcible taking is not required.² Thus a ship-owner, who refuses to carry a passenger whom he has engaged to carry, and proceeds on the voyage without giving the passenger reasonable opportunity to remove his luggage, or with the intent to carry it beyond his reach, thereby terminates the contract of carriage, and is liable in trespass for the carrying away of the luggage.³ So a deed, conveying land to a corporation, which had been delivered to an agent of the corporation for safe keeping, was subsequently given up by him to the grantor at the grantor's request, and on the ground that he had objected to the deed at the time when it was executed. Held, that trespass might be maintained by the corporation against the grantor, at least for nominal damages.⁴ So actual force is not necessary to constitute a trespass upon land. Thus every one, who enters into the possession of unoccupied lands, without right or title derived from the owner or the law, and more especially without *claim* of title, and for the purpose of keeping the true owner out of possession; is a trespasser.⁵ And a *peaceable* entry is held not to be one merely unaccompanied with actual violence or breach of the peace.⁶ So trespass *qu. claus.* will lie, without even actual *entry* on the land; as where the defendant stood elsewhere than upon the plaintiff's land, and shot game thereon.⁷ Or where one stands on his own ground or in the street, and with missiles breaks the house of another.⁸ So, where A. brought an action of trespass against B., for breaking and entering his close, and cutting and carrying away certain pine timber;

¹ Furlong v. Bartlett, 21 Pick. 401.

² Gibbs v. Chase, 10 Mass. 125.

³ Holmes v. Doane, 3 Gray, 328.

⁴ Second Con. Society v. Howard, 16 Pick. 206.

⁵ McCall v. Capehart, 20 Ala. 521;

Newkirk v. Sabler, 9 Barb. 652; 1 Swan, 96; 15 Ill. 53.

⁶ Norvell v. Gray, 1 Swan, 96.

⁷ Pickering v. Rudd, 1 Stark. 56. But see Keble v. Hickringill, 11 Mod. 74, 130.

⁸ Frowitt v. Clayton, 5 Monr. 4.

and the evidence tended to show that the timber was not cut on the plaintiff's land, but was drawn across it; held, the action could be maintained, even if the cutting were not upon the plaintiff's land.¹ And although, in general, a trespass involves an original unlawful *taking* or entry, yet, as in case of nuisance, so trespass is the proper remedy for wrongfully *continuing* a building on the plaintiff's land, for the erection of which he has already recovered compensation. A recovery, with satisfaction, even by money paid into court, for the erection, does not operate as a purchase of the right to continue the trespass; but, after notice and refusal to remove, a new action may be brought.² And where the bargainor in a deed, after executing a conveyance, remains in possession, and, contrary to the expressed wishes of the bargainee, cuts down timber, he is liable to an action of trespass *qu. claus*.³ But although, where the rightful owner of land is dispossessed, he may maintain an action against the wrongdoer for the original trespass, he cannot, for any injury afterwards committed by such wrongdoer, until he has regained possession.⁴ And if the defendant continues in actual possession, after a recovery and satisfaction in trespass, the plaintiff cannot maintain a second action against him for continuation of the trespass, unless he shows a title which would carry with it the constructive possession.⁵ (a)

¹ Brown v. Manter, 2 Fost. 468.

³ Spencer v. Weatherly, 1 Jones,

² Holmes v. Wilson, 10 Ad. & El. Law, 327.

503.

⁴ Rowland v. Rowland, 8 Ham. 40.

⁵ Segar v. Kirkley, 23 Ala. 680.

(a) In trespass *qu. claus*. the declaration alleged, that the defendant, on a day specified, broke and entered the plaintiff's close, and ejected him therefrom, and kept and continued him so ejected from thence hitherto, whereby the plaintiff, during all that time, lost the use and benefit of said close. Held, the declaration was good; that it did not present a claim for damages for the continuance of the trespass, but only showed the character of the original trespass as being a complete disseisin, and not a mere temporary possession. Bailey v. Butcher, 6 Gratt. 144.

In trespass for placing stumps and stakes on the plaintiff's land, the

And it may be further remarked, that, in trespass *qu. claus.* the gist of the action is the breaking and entering the plaintiff's close; *the injury done therein* is matter of aggravation only. Hence it is not an objection to the whole count, that such injury is not well laid.¹ So a party putting a fence on, or ploughing, the land of another, although not materially injuring him, is liable as a trespasser.² (a)

6. In reference to the *parties* to an action for trespass, we have already fully explained (chapter 10) the sufficiency and necessity of *possession*. This element, applicable to some

¹ Rucker v. O'Neily, 4 Blackf. 179.

² Pfeiffer v. Grossman, 15 Ill. 53.

defendant paid into court 40s., which the plaintiff took out in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him. Held, that the leaving of the stumps and stakes on the land was a new trespass. Bowyer v. Cook, 4 Com. B. 236.

Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held, that at any rate he was liable in trespass *qu. claus.*, for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. Winterbourne v. Morgan, 11 E. 395.

(a) With regard to *intention*, as affecting this action, it has been recently decided, that in trespass *qu. claus.* the intent is immaterial. Luttrell v. Hazen, 3 Sneed, 20.

But it has been held, that, in trespass against an overseer of the highway, for cutting down a tree therein, evidence is admissible, of improper motives, and that the act was done maliciously. But the state of feeling between the parties *at the time* is alone material, and not the cause or history of the quarrel. Winter v. Peterson, 4 Zab. 524.

So in an action of trespass, for pulling down a house which had been rented by the defendant to the plaintiff, testimony of a threat, that, if the plaintiff's daughter did not yield to the defendant's unchaste solicitations, he would pull down the house, is competent evidence to show the malicious feelings of the defendant, and to establish the identity of the person committing the act; and a threat to kill the daughter, if she did not yield, is also evidence to prove the malice of the defendant. Chapman v. Kincaid, 8 Humph. 150.

extent to all forms of injury, is more especially so in case of trespass. The possession, however, or ownership, has reference to the time of the injury, not of the action. Thus trespass *de bon. aspor.* is rightly brought, in the name of the person who was the owner of the goods at the time of the trespass, although he may have sold them before the action was commenced. And if the vendee brings such action in the name of the vendor without authority, the defendant should make the objection at the first term. A judgment in such action, prosecuted for the benefit of the vendee, would be a bar to an action of trover subsequently brought by the vendee in his own name.¹ So, if A.'s personal property is attached in a suit against B., and A. sells and assigns his property to a third person while it is under attachment; an action of trespass for the benefit of the vendee against the attaching officer is properly brought in the name of A.² So one who has aliened the land, before action brought, may maintain trespass *qu. claus.* for a trespass committed before alienation.³ And it may be further remarked, that in this action time is not material, (see p. 223); and, if the trespass is alleged to have been committed before the title of the plaintiff accrued, it may be proved to have been afterwards.⁴

7. With reference to the *pleadings* in the action for trespass, it may be remarked, that they are for the most part required to be more accurate and technical than in other actions for tort. (a) A few of the more general rules may here be stated. (b)

¹ *Boynton v. Willard*, 10 Pick. 166.

² *Holly v. Huggesford*, 8 Pick. 73.

³ *M'Gran v. Bookman*, 3 Hill, S. C. 265.

⁴ *Cooper v. Taylor*, 3 Green, 455.

(a) See *Pleading*.

(b) Like other actions for injury to real property, the action of trespass *quare claus.* is local, and can be brought only in the county in which the trespass was committed. *Haim v. Rogers*, 6 Blackf. 559; *Champion v. Doughty*, 2 Harr. 3; *Chapman v. Morgan*, 2 Greene, 374.

It must be proved that the close described is within the county. *Pritchard v. Campbell*, 5 Ind. 484.

8. With regard to the *time* of the injury, a declaration—as, for example, for cutting down trees, on several occasions—may allege the trespasses to have been committed on different days and times, but not with a *continuando*.¹ But, where a day is laid in the declaration, and from such day to the commencement of the action divers trespasses were committed, one trespass only may be proved prior to the day named, but divers may be proved within the time laid.² And, on the other hand, in trespass *qu. claus.*, alleged to have been committed *diversis diebus*, &c., if the plaintiff give evidence of one or more acts of trespass within the days specified, he shall not prove an act done at any other time; but he may waive his right to prove any act within the days, and may prove one done at any other time allowed by the statute of limitations.³ It is said, “Originally every declaration in trespass seems to have been confined to one single act of trespass. When the injury was of a kind that could be continued without intermission from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass. In more modern times, in order to save the trouble and expense of a distinct writ or count for every different act, the plaintiff is permitted to declare for a trespass on divers days and times between one day and another; and such a declaration is considered as if it contained a distinct count for every different trespass. But as this is for the advantage and ease of the plaintiff, he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass—in which case the time becomes immaterial. As it would give the plaintiff an

¹ *Rucker v. McNeely*, 4 Blackf. 179.

³ *Pierce v. Pickens*, 16 Mass. 470.

² *United States v. Kennedy*, 3 McLean, 175.

And the plaintiff cannot prove a trespass anywhere but where it is laid in the declaration, nor lay it anywhere but where it is done. *Walrond v. Van Moses*, 8 Mod. 322.

undue advantage, if he could avail himself of the declaration in both these modes, and might operate as a surprise on the defendant; the plaintiff must make his election before he begins to introduce his evidence."¹ But, in general, where a particular *place* is assigned in the declaration, the trespass must be proved as laid.² And evidence of a trespass upon lands other than those described in the writ is not admissible.³ Thus, where the owner of several closes in the same town declares, generally, that the defendant broke and entered his close in that town, and thereon committed certain acts; he may prove such acts on any one close in that town; but he must be confined to that close, whether testimony as to an entry upon another be objected to or not.⁴ And, in trespass for breaking the plaintiff's close, and destroying his mill-dam, evidence of a trespass committed on a part of the dam without the close is inadmissible.⁵ So, the plaintiffs being owners of a close and a mill thereon on the north side of a river, and their mill-dam being rightfully extended to land on the other side which they did not own, the defendants crossed the river below the plaintiffs' land, and destroyed a part of the dam on the south side, and, having effected their object, they recrossed the river at the same place and went upon the plaintiffs' close. Held, the destruction of the dam and the entry upon the close were distinct trespasses, so that a judgment for the latter would not be a bar to an action for the former.⁶ But, in trespass for breaking and entering the plaintiff's close, and destroying his mill-dam, evidence is admissible of the destruction of a dam in the same close and across the same stream, at some distance above the mill, called the false dam, and used only for stopping the water for the convenience of repairing the mill-dam below.⁷

9. It has been held, that a declaration in trespass for break-

¹ Per Jackson, J., *Pierce v. Pickens*, 16 Mass. 470. See *Haak v. Breidenbach*, 3 S. & R. 206.

² *Manning v. McDonnell*, 3 Brev. 15.

³ *Longfellow v. Quimby*, 29 Maine, 186.

⁴ *Elliott v. Shepherd*, 25 Maine, 371.

⁵ *White v. Mosely*, 5 Pick. 230.

⁶ *Ibid.* 8 Pick. 356.

⁷ *Durgin v. Leighton*, 10 Mass. 56.

ing the plaintiff's close, &c., is bad, on general demurrer, if it do not describe the close.¹ So, that the *locus in quo* ought to be designated by abutments or other description, as it stood at the time of the trespass, and not at the time of the declaration.² But on the other hand it is held not necessary to describe the close, either by name or by abutments.³ And, in respect to the terms of description, where the declaration describes the close as bounded north on the land of an adjoining owner, it is sufficient to show that owner's land to be in any degree north.⁴ So it is sufficient to describe the land as abutting on a windmill, though a highway lies between.⁵ So, if the land is described as part of a particular lot, and also as bounded by particular lines and monuments evidence may be offered in reference to any land falling within such bounds, though not included in the lot named.⁶ (a)

10. In an action of trespass for taking and carrying away goods, the omission to state the *value* of the goods is matter of form only, and is cured by pleading in chief as well as by verdict, and is not a ground of exception to the admission of evidence to prove the value.⁷ So, in an action of

¹ *Moody v. Hinkley*, 34 Maine, 200.

² *Humphrey v. London, &c.* 20 Eng. L. & Eq. 384.

³ *Noys v. Colby*, 10 Fost. 143.

⁴ *Rollins v. Varney*, 2 Fost. 99.

⁵ *Nowell v. Sands*, 2 Rolle's Abr. 677.

⁶ *Poor v. Gibson*, 32 N. H. 415.

⁷ *Baker v. Baker*, 13 Met. 125.

(a) A declaration described the close as bounded northerly by land of S. and others, easterly by the old N. B. Turnpike, southerly by the road leading to W., and westerly on W. River. Held, that this description sufficiently complied with a statute, which required that "the close, or place of the alleged trespass, shall be designated by name or abutments, or other proper description." *Forbush v. Lombard*, 13 Met. 109.

In an action of trespass, the declaration alleged, that the defendant "broke and entered the plaintiff's dwelling-house in L., being the same dwelling-house occupied by the plaintiff, with force and arms, and did then and there imprison the plaintiff for the space of one hour, without any legal or probable cause." Held, that this was an action of trespass on real estate, *qu. claus. fregit*, and that the place of the alleged trespass was sufficiently designated by name according to the above statute. *Sawyer v. Ryan*, 13 Met. 144.

trespass for an injury to cattle, without taking or converting them, the averment of value is not material. If it were, the want of it could only be taken advantage of by special demurrer.¹

11. With regard to the defence against an action for trespass, the general rule is, that every defence, which admits the defendant to have been *prima facie* a trespasser, must be specially pleaded; but a denial of the acts may be made under the general issue. So also a denial that the plaintiff had a property in the land or goods, which may be proved, under this issue, by showing a freehold and immediate right of possession in the defendant.² (a) In conformity with this rule, as has been already explained, (p. 35,) title is a good defence to an action for trespass. But, although it may be offered in evidence under the general issue, yet the plea of *liberum tenementum*, with a right of entry, is also a familiar form of defence.³ (b) The plea puts in issue only

¹ Bean v. Green, 4 Cush. 279.

³ Crockett v. Lashbrook, 5 Monr. 530.

² 1 Chit. Pl. 437; 2 Greenl. Ev. § 625; Riley v. Denny, 2 Rich. 539.

(a) In general, title *at the time of the alleged trespass* must be shown. But this rule does not apply to any mere formal authentication of title, which will be sufficient if made before the trial. Thus a judgment record, which is the evidence of such title, need not have been signed and filed at the time of the alleged trespass, if signed and filed before the trial. Van Orman v. Phelps, 9 Barb. 500.

(b) This plea may be made, though the declaration describes the close with precision, by metes and bounds, &c. Fisher v. Morris, 5 Whart. 358.

But, on the other hand, the plea itself is required thus to describe the close, where the nature of the defence requires a designation more particular than that in the writ. Thus the defendant pleaded, as to so much of the land described in the declaration, as lay on one side of a line set forth in a conveyance referred to, *soil and freehold*; and as to the rest of it not guilty. Held, as the plea did not describe the line by fixed monuments on the land, it was bad on demurrer. Orange v. Berry, 4 Fost. 105.

This plea is not good, to a declaration for breaking the plaintiff's close, and beating him, his servants, and horses. Tribble v. Frame, 3 Monr. 13. See Willard v. Warren, 17 Wend. 257.

the question whether the premises are the freehold of the defendant or not.¹ And it must distinctly present this question. Thus in trespass for breaking and entering the doors and windows of a meeting-house, a plea, that the defendants entered as members of the religious society, peaceably, for the purpose of religious worship, as they might lawfully do, doing no unnecessary damage, which are the supposed trespasses; is bad on demurrer, in not alleging that the defendants were members of the society, and not denying the acts charged as trespasses, nor setting forth any cause in justification of them.² And the general issue and *liberum tenementum* may be pleaded together.³ (a) In which case the burden is on the plaintiff to prove his case, and he is entitled to open and close.⁴ But a plea of title alone admits the possession of the plaintiff, and he need not prove it.⁵

12. On the trial of issues, on general replication to *liberum tenementum*, pleaded to two counts, the plaintiff cannot recover, unless he proves two closes, and a trespass on each, if the defendant is entitled to land in the county.⁶ But, where the declaration alleges the trespass in entering the close and dwelling-house of the plaintiff, and the defendant pleads *liberum tenementum*, he must confine his proof to the dwelling house, and may not show title in another tenement.⁷ (b)

¹ Gilchrist v. McLaughlin, 7 Ired. 310.

² Baptist Society v. Fisher, 3 Harr. 240.

³ Hext v. Jarrell, 2 Strobb. 172. See Dover School v. M'Farlan, 2 Green, 471.

⁴ Jennings v. Maddox, 8 B. Mon. 430.

⁵ Appleby v. Obert, 1 Harr. 336.

⁶ Tribble v. Frame, 7 Mon. 529.

⁷ Hope v. Cason, 3 B. Mon. 544.

(a) Where the defendants pleaded not guilty as to the force and arms, and a special justification as to the residue of the trespass, and the jury returned a general verdict of not guilty, judgment was entered thereupon. Hodges v. Raymond, 9 Mass. 316.

But where the defendant pleaded: 1, the general issue; 2, *liberum tenementum* with a justification; and the jury returned a verdict of guilty on the first issue and not guilty on the second; held, such verdict must be set aside for uncertainty. Turner v. Beatty, 4 Zab. 644.

(b) With regard to the right of recovering for only a part of the cause

13. In trespass to personal property, as well as *qu. claus.*, if the general issue alone is pleaded, and the trespass is

of action alleged, it is no defence to an action of trespass for taking and carrying away certain articles, that the defendant owned and had a right to carry away one of them; but the plaintiff may recover for the others. *Holley v. Brown*, 14 Conn. 255.

If a declaration contain several counts, a plea, professing to answer the whole declaration, answering only one of the counts, and not averring the identity of the trespasses described in the different counts, is bad on general demurrer; and, although it contain the averment of identity, is bad on special demurrer. *Rubottom v. M'Clure*, 4 Blackf. 505.

So, in trespass *qu. claus.*, where the plaintiff declares, setting out the close with abutments; upon the plea of *liberum tenementum*, it is not necessary that he should show title to every part of it; it is enough if he show title to that part of the close in which the trespass was committed. *Ring v. Dunse*, 21 Wend. 253.

So, if the plaintiff shows trespasses on different parts, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others. *Duncle v. Wiles*, 6 Barb. 515.

The plaintiff is not bound to show a trespass upon the whole premises, nor the defendant that he has a title to the whole, in order to succeed; but each may succeed, *pro tanto*, according to the proof. *Ibid.*

It is said, "When the defendant, following the declaration, asserts in his plea, that the close in which, &c., is his soil and freehold, this plea means, that the part of the close so described in the declaration, on which he admits that he has done the acts complained of, was his soil and freehold. By this plea, therefore, he undertakes to prove two propositions: first, that some part of the described close belongs to him; and secondly that it is on this part of the close, that all the acts complained of have been done. If he does this, he is entitled to the verdict; if not, the plaintiff must succeed." Per Alderson, B., *Smith v. Keyston*, 1 Dowl. P. C. (N. S.) 124.

Where the issue in trespass *qu. claus.* was, whether "the close in which," &c., was a certain close known by the name of B., and whether the same close, for thirty years last past and upwards had been separate from a certain common; and the jury found that part of B. had been enclosed within thirty years, and that the alleged trespass had been committed in the enclosed part only; held, upon this finding, the defendant was entitled to the verdict. *Richards v. Peake*, 4 Dowl. & Ry. 572.

The plaintiff declared in trespass for breaking his close, and set out the close by abutments. The defendant justified, alleging that the said close, in which, &c., was part of an allotment of six acres made by commissioners

proved or admitted, the plaintiff must have a verdict for some amount.¹ And, generally, in an action of trespass, under the plea of not guilty, the defendant cannot give in evidence matter in discharge.² Nor evidence of a former recovery.³ So a license from the plaintiff, if not specially pleaded, cannot be used in justification, but only in mitigation of damages.⁴ Though it is otherwise in an action brought before a justice of the peace, a license not bringing the title to the land in issue.⁵ So it has been held, in trespass *qu. claus.*, that the defendant may prove title in a third person, and a license from him under the general issue, or plead such facts specially.⁶ (a)

¹ Hendricks v. Trapp, 2 Rich. 93.

² Austin v. Norris, 11 Verm. 28.

³ Young v. Rummel, 2 Hill, 478.

⁴ Hendricks v. Trapp, 2 Rich. 93;
Hill v. Morey, 26 Verm. 178. See Cox

v. Dove, Martin, 43; Lee v. Meeker, 2 Wis. 487.

⁵ Wheeler v. Rowell, 7 N. H. 515.

⁶ Razer v. Qualis, 4 Blackf. 286.

duly authorized, for certain purposes, in execution of which he entered. The plaintiff denied that the close in which, &c., was part of the six acres in the plea supposed to have been allotted; and thereupon issue was joined. It appeared that the close set out by abutments was not all within the allotment, but that the part in which the actual trespass occurred was within it. Held, that the justification was made out. *Bassett v. Mitchell*, 2 B. & Ald. 99.

If, in an action of trespass *qu. claus.*, the defendant pleads specially, that the act complained of was not committed where the plaintiff, in his declaration, alleges it was, but upon an adjoining lot, where the defendant was justified in committing such act; the plea amounts to the general issue, and the plaintiff will be entitled to judgment upon a demurrer thereto. *Dorman v. Long*, 2 Barb. 214.

(a) The following are enumerated as the various defences which may be set up by special plea to the action of trespass: "An excuse of the trespass, on account of a defect of fences, which the plaintiff was bound to repair, and a license from the plaintiff, and a justification under a rent-charge, or in respect of any easement or incorporeal right, as common of fishery, or of pasture, or of turbary; and a right of way, either public or private, and whether by grant, will, prescription, custom, or of necessity, must be pleaded. So the defendant must plead an entry by authority of law without process, as that the *locus in quo* was an inn, or that the defendant entered to demand payment of his debts; or to prevent murder; or by virtue of pro-

14. It may be added in this connection, without reference to the pleadings, that, as already explained, (chapter 10,) it is a sufficient defence to an action of trespass, that the acts complained of were done in asserting the defendant's title to his own property. Thus the plaintiff placed a seine-reel on the land of the defendant near to a river, and the defendant gave him reasonable notice to remove it, and, on his neglect to remove it, cut it down and shoved it towards the river, and it floated off. Held, the defendant's acts were justifiable, and not a trespass upon the plaintiff.¹ So, in trespass for pulling down hedges, the defendant may justify that he had a right of common in the place where, &c., and that the hedges were made upon his common, so that he could not enjoy his common *in tam amplo modo*, &c.² So a person finding horses trespassing on his land may turn them into the highway, and is not liable, though they may be lost in consequence.³ So, in trespass *qu. claus.*, the defendant may prove, in mitigation of damages, that the trespass was not wilful and malicious; as that he entered to survey off a portion of the premises sold for quit rents.⁴ So, in trespass for entering a yard, the defendant was allowed to plead, that he entered for the purpose of viewing a mare then in a stable in the yard, which had been recently stolen from him.⁵ So,

¹ *Almy v. Grinnell*, 12 Met. 53.

² *Mason v. Caesar*, 2 Mod. 66.

³ *Humphrey v. Douglass*, 10 Verm..

71. See *Crane v. Mason*, Wright, 333.

⁴ *Machin v. Geortner*, 14 Wend. 239.

⁵ *Webb v. Beavan*, 6 M. & Gr. 1005.

cess, civil or criminal, of a superior or inferior court, under mesne process, as a *latitat*, &c., or under final process, as a *fi. fa.*, *elegit*, &c., and in trespass to land, where a removal of personal property is also alleged, the plea should, as to the personal property, be special, and show possession of some land, &c., and justify the removal, &c., damage feasant, &c. In all actions of trespass, whether to the person, personal or real property, matters in *discharge* of the action must be pleaded; as accord and satisfaction, arbitrament, release, former recovery, tender of sufficient amends, and the statute of limitations." Actions against public officers, however, are usually excepted by express statute from the requisition of special pleading. 1 Chit. Pl. 497-8.

if a contract by A., to erect a building on B.'s land, be rescinded before completion, A., or those under him, may lawfully enter on the premises of B., to remove their property intended for use in such contract, doing no unnecessary damage. And if the defence, to an action for such entry, aver that the contract was abandoned in consequence of B.'s interference, it is still competent to show, under such specification, that the abandonment was by mutual consent.¹ And in general the plea of *license*, which is the technical foundation of the defence now under consideration, includes a license in *law* as well as in *fact*; as an entry to execute legal process, or to distrain; or by a remainder-man, &c., to see whether waste has been done or repairs made; or by a commoner, to view his cattle; or by a landlord at the expiration of the lease.² So, if the plaintiff's goods, left in the defendant's building, were an incumbrance, and he removed them to the plaintiff's close; or if the plaintiff unlawfully took the defendant's goods and conveyed them within the plaintiff's close, and the defendant thereupon, making fresh pursuit, entered and retook them; the facts may be relied upon as a license.³ But it is held no justification of an entry upon another's land, that the goods of the party entering were upon the land, and the owner of the goods entered to take them.⁴ More especially, if the goods were wrongfully placed upon the land, the owner has no right to retake them by force. Thus, where A. sent his horses and wagon on to the land of B., after being forbidden by B. to do so, and the servant of A., in returning, found the fence put up at the road, so as to prevent his taking away the horses and wagon, and left them on the land and went to inform his master; held, A. had no right to enter upon the land of B. for the purpose of taking his team away; and, A. having proceeded

¹ *Arrington v. Larrabee*, 10 Cush. 512.

² 5 Com. Dig. 805; *Pleader*, 3 M. 35.

³ *Rex v. Sheward*, 2 M. & W. 424; *Patrick v. Colerick*, 3 Ib. 483.

⁴ *Anthony v. Harveys*, 8 Bing. 186; *Heermance v. Vernoy*, 6 Johns. 5; *Williams v. Morris*, 8 M. & W. 488; 9 Barb. 652.

forcibly to tear down the fence, for the purpose of entering, that B. had a right to defend his possession against such aggression, and to use as much force as was necessary therefor.¹ And the defendant, more especially in pleading, is required to show that his act, which would otherwise be a trespass, was necessary at the time, in asserting a title to his own property. Thus to trespass for breaking and entering the plaintiff's close, called *the manor*, the defendants pleaded, first, not guilty, and second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public and common navigable river from time immemorial; and that there is, in that part of the port which is within the manor, a certain ancient work or erection, belonging to the said port, necessary for the preservation of the same, for the safety and convenience of the ships resorting thereto; that this work being damaged and in decay at the said times when, &c., it became necessary that the said work should be repaired, but that the plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore the defendants entered and repaired. Replication, *de injuriâ sua*. A verdict having been found for the plaintiff on the general issue, and for the defendant on the special plea; held, that the plaintiff was entitled to judgment, notwithstanding the finding on that plea, inasmuch as it did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that the defendants had occasion to use the port.² (a)

¹ *Newkirk v. Sabler*, 9 Barb. 652.

² *Lonsdale v. Nelson*, 3 D. & Ry. 556.

(a) But, in trespass *qu. claus.*, if the defendants justify under a statute, authorizing a corporation to take the land for public use, the plea need not allege that the corporation have taken the proper measures to ascertain the damages. Such matter, if available to the plaintiff, should be replied. *Rubottom v. McClure*, 4 Blackf. 505.

15. With regard to *the damages* in the action for trespass, (a) it is held that trespassers are liable for all such damages as necessarily arise from their acts. Thus they are liable, not only for the materials of a sluiceway to a mill, destroyed by them, but also for damages sustained by the owner in being deprived of the use of it.¹ And consequently, in trespass for taking away property, and depriving the plaintiff of the use of it, the plaintiff may prove the value of the use during the time he was deprived of the possession.² And the defendant cannot justify, upon the ground of a benefit to the plaintiff arising from the trespass, and subsequent thereto. Thus, in trespass *qu. claus.*, it is no defence, that after breaking the plaintiff's close the defendant erected valuable buildings on the land.³

16. In an action of trespass for taking a slave out of the immediate possession of the plaintiff, evidence of abusive language to the plaintiff, at the time of the trespass, is admissible, to show *quo animo* the act was done, and to enhance the damages.⁴

17. The jury, in trespass to personal property, cannot increase the amount of their verdict for the plaintiff, by an allowance of counsel fees.⁵ Nor, in an action of trespass for breaking and entering the dwelling-house of the plaintiff and doing other enormities to him, can he give evidence of an assault upon him.⁶

18. One of the most important and frequent acts of trespass is the unlawful entry upon a party's *dwelling-house*. (b) A dwelling-house is defined as "a building inhabited by man."⁷ And a *door* is the place of usual entrance in a

¹ *Hammat v. Russ*, 4 Shep. 171.

² *Warfield v. Walter*, 11 Gill & Johns.
80.

³ *Haynes v. Thomas*, 7 Ind. 38.

⁴ *Ratliff v. Huntley*, 5 Ired. 545.

⁵ *Young v. Tustin*, 4 Blackf. 277.

⁶ *Sampson v. Coy*, 15 Mass. 493.

⁷ *Bouv. Law Dict.*

(a) See *Damages*.

(b) Entering a dwelling-house without license is a trespass. Keeping an inn amounts to a general license, and familiar intimacy may be evidence of a general license. *Adams v. Freeman*, 12 Johns. 408.

house.¹ The general rule of law is, that an outer door cannot lawfully be broken, except in the service of criminal process, or of a *habere facias*.² It is said, "A man's dwelling house is his castle, not only for his own personal protection, but for the protection of his family and property therein. A defendant in an execution, by closing the outer doors of his dwelling against the sheriff, may prevent the latter from entering to make a levy on his goods."³ Thus, in trespass, for breaking open the outer door of the plaintiff's dwelling-house, and entering therein, &c.; plea, justifying the entry generally under a *pluries fi. fa.*; demurrer, assigning for cause, that in the plea it was not averred that the outer door was open at the time the defendants entered under the writ; held, the plea was bad.⁴ So, in trespass for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, &c.; pleas, first, not guilty; secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. Replication (admitting the writ and warrant) *de injuriâ absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him. Held, first, that the averment in the plea, that the outer door was open, was a material averment, this being a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door; secondly, the defendants having become trespassers *ab initio* by the breaking of the door, that the jury were rightly directed, that they might (even on the plea of not guilty) give damages for all the injuries com-

¹ Bouv. Law Dict.

² *Ibid.*

³ Per Walworth, Ch., *Curtis v. Hubbard*, 4 Hill, 437.

⁴ *Buckenham v. Francis*, 11 Moo. 40.

plained of in the declaration.¹ So, on the other hand, in trespass for breaking and spoiling a lock, bolt, and staple appertaining and fixed to the outer door of the plaintiff's dwelling-house, and wherewith the same was fastened; plea, that a *fi. fa.* issued against the plaintiff, and was delivered to the defendant, being a sheriff; by virtue whereof the defendant, then lawfully being in a room of the dwelling-house occupied by D. as tenant to the plaintiff, peaceably entered into the residue of the dwelling-house, through the door communicating between the room and the residue, the same being then open, to take in execution the plaintiff's goods then in the dwelling-house, and did take them; and, because the outer door was shut and fastened with the lock, bolt, and staple, so that the defendant could not carry away the goods or execute the writ without opening the outer door, nor open the door without breaking the lock, &c.; and because neither the plaintiff nor any other on his behalf was in the dwelling-house, so that the defendant could request the plaintiff or such other to open the outer door, the defendant, for the purposes aforesaid, did open the outer door, and in so doing, did necessarily break, &c., the locks, &c., doing no unnecessary damage. Held, on demurrer, that the plea was good, though it was not shown how the defendant entered into the house, nor who fastened the outer door; and that it sufficiently appeared that there was no other way of getting out.² (See p. 237.)

19. Where a person goes to the house of another, for the purpose of serving a *subpœna* upon him, and the latter is in the house at the time, these circumstances constitute a legal right to enter; and if the former finds the outer door open, and enters peacefully, he is lawfully there, and may use such force as is necessary to overcome any resistance he may meet with in the service of the *subpœna*; being liable only for an excess of violence, beyond what is necessary to overcome the resistance. And the fact, that the person having the

¹ *Kerbey v. Denby*, 1 M. & W. 336.

² *Pugh v. Griffith*, 7 Ad. & Ell. 827.

process is ordered by the wife of the party sought to be served to leave the house, will not render him a trespasser in proceeding to serve the subpoena.¹

20. If a dwelling-house be capable of being used as a double house, or as a distinct residence for two families, each family having an outer door, and be thus used by the families of two persons ; an officer, who has an execution against one, and enters the other's outer door by consent of the latter, has no authority to break open the door of the debtor's room, which adjoins a room of the other tenant, for the purpose of arrest. But if the door of the debtor's room be of common use and passage for the families of both, at the pleasure of both, either to go out of the house through the other tenant's outer door, or as a passage-way to the interior of the house ; then such door is not privileged as an outer door, and the officer may lawfully enter it forcibly for the purpose of arrest.² And it seems that a sheriff's officer, acting under civil process, after demanding admittance, may justify breaking the inner doors of the defendant's house, though he be not therein at the time.³ In the execution of criminal process, in the case of a misdemeanor, it is necessary to demand admittance, before breaking the outer door. But it is doubted whether the same rule applies in the case of felony.⁴ And if a window be open, and a bailiff put his hand in and touch one against whom he has a warrant, he is thereby his prisoner, and he may break open the door to come at him.⁵

21. In reference to the service of process, in connection with unlawful entry upon a dwelling-house ; (a) as a general rule, no one can acquire by his own illegal act a right to the

¹ Hager v. Danforth, 20 Barb. 16.

⁴ Launock v. Brown, 2 B. & Ald. 592.

² Stedman v. Cranc, 11 Met. 295.

⁵ Anon. 7 Mod. 8.

³ Ratcliffe v. Burton, 3 Bos. & Pul.
223.

(a) If bailiffs break open doors to execute process, the party injured may have an action of trespass ; but the Court will not grant an attachment against them, unless it appear to have been in abuse of the process of the law. 6 Mod. 105.

custody of another's person or property.¹ Therefore where, the outer door of a dwelling-house being latched merely, the sheriff entered it contrary to the known will of the owner, and levied upon his goods therein by a *fi. fa.*; held illegal, though the owner was not in the house at the time, and that the levy gave the sheriff no right to remove the goods. Also that even a guest in the house might lawfully resist the sheriff's attempt to remove goods thus seized, using no more force than was necessary.² But, where a mortgagee of a house entered into it with an officer, by opening the outer door thereof in the absence of the mortgagor and his family, before the condition of the mortgage was broken, and without giving notice to the mortgagor to quit, and the officer by the mortgagee's direction attached the mortgagor's goods in the house; and the mortgagor brought an action of trespass against the mortgagee and the officer for breaking and entering the house and carrying away the goods; held, the action could not be maintained.³ And where a sheriff was lawfully in a room, occupied by an under-tenant of the plaintiff in his dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods under a *fi. fa.*; and, having seized the goods, was unable to carry them away without himself opening the outer door, which was locked, neither the plaintiff, nor any one on his behalf, being present, whom the sheriff could request to open the door; held, he was justified in breaking the outer door and the lock thereof, in order to carry away the goods.⁴ (See p. 235.)

22. Entry into a dwelling-house (a) is often justified by

¹ Per Walworth, Ch., *Curtis v. Hubbard*, 4 Hill, 437.

² *Ibid.*

³ *Lackey v. Holbrook*, 11 Met. 458.

⁴ *Pugh v. Griffiths*, 3 Nev. & Per. 187.

(a) Under a warrant in the usual form, on a complaint for larceny, the officer is authorized to break and enter the *shop* of the person accused, and seize the chattel alleged to have been stolen. *Banks v. Farwell*, 21 Pick. 156.

a *search-warrant*, or other similar process to be levied upon goods therein. And where an officer seizes goods on a search-warrant, which correspond with and come within the description of those for which he is commanded by the warrant to

In a plea of justification under a search-warrant, it is not necessary to allege that the complaint was signed, or any minute made of the day, month, and year, when it was exhibited, or that any recognizance for cost was given, or that the warrant was returned. Nor is it necessary to state the grounds of suspicion of the person praying out the warrant. *Chipman v. Bates*, 15 Verm. 51.

In an action for maliciously, and without probable cause, issuing a search-warrant to search the plaintiff's house, for goods alleged to have been stolen from the defendant; the Judge charged the jury that, in his opinion, there would be sufficient to constitute probable cause, if they believed the facts given in evidence, and left it to them on the whole of the case to find whether there had been probable cause or not; and also directed them to find for the plaintiff, if they believed that there was any malice on the part of the defendant. Held, that the direction was right, and that, the jury having found for the defendant, the Court could not interfere in granting a new trial. *Power v. Harrison*, 4 Irish L. R. 122.

- Where the evidence, in an action of trespass *qu. claus.*, tended to prove, that the defendant entered the dwelling-house of the plaintiff by virtue of a search-warrant to find stolen goods, and, after the search had been concluded, and the goods had been found and taken, together with the plaintiff, before the magistrate who issued the warrant, again aided others in entering the house for the purpose of finding evidence merely against the plaintiff, to be used in convicting him of the theft; and the Court instructed the jury that, if the defendant went to the house the second time merely for the purpose of finding more evidence against the plaintiff, and assumed, as a mere pretext, to go for some other purpose, the plaintiff was entitled to recover; it was held, that there was no error in the charge. And where it appeared, in such case, that, immediately previous to the issuing of the search-warrant, the defendant said, that "he had got a place fixed for Lawton," meaning the plaintiff, and the jury were instructed, that if this was said by the defendant in reference to the prosecution, it could have no tendency to increase the damages, but that, if they believed the defendant went into the plaintiff's house merely to abuse and insult him, without any serious belief that he was guilty, it might be considered by them in estimating the damages, and the jury returned a verdict for the plaintiff; it was held, that herein there was no error. *Lawton v. Cardell*, 22 Verm. 524.

search; he is not liable to an action, though the goods so seized by him may not be the same which were lost by the complainant.¹ (a) And, in trespass for searching the plaintiff's house *without warrant*, circumstances of reasonable suspicion, that implements or evidences of crime are there concealed, may be given in evidence in mitigation of damages.² But where no goods are found upon a search-warrant, the person upon whose oath the warrant was obtained will be liable in trespass.³ But if the officer enters the dwelling-house of the person against whom the process issues, the door being open, and without any unnecessary damage, to execute the same; the owner of the house cannot maintain trespass against the party who prays out the process, although the goods were not found.⁴

23. *Arrest of the body*, as well as seizure of property, may also be set up as a justification for such entry. Thus an officer acting *bonâ fide* may break and enter another's dwelling house to arrest him on a criminal charge, although in the mistaken belief that such person is in the house at the time,

¹ *Stone v. Dana*, 5 Met. 98.

³ *Reed v. Legg*, 2 Harring. 173.

² *Simpson v. M'Caffrey*, 13 Ohio, 508.

⁴ *Chipman v. Bates*, 15 Verm. 51.

(a) So, in trespass for breaking and entering the plaintiff's house, and continuing therein from, &c., till the commencement of this suit; the defendant, as to the continuing in the house for a part of the time, "to wit, for the space of two days," justifies as sheriff under a *fi. fa.* issued against the goods of T. K, deceased, in the hands of the plaintiff's wife, as administratrix, to be administered; and that, having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in the declaration mentioned, the same being a reasonable time in that behalf. The replication alleges, that the two days mentioned in the plea were an unreasonable length of time, for the defendant's searching for the goods; and then new assigns. Held, on special demurrer, first, that the replication was bad, in having tendered an immaterial issue, and also as being double; secondly, that the defendant was justified in entering the plaintiff's house, by his belief that the goods were there, though that belief were not justified by the event. *Cook v. Birt*, 1 Marsh. 333.

provided he first requested an entrance, and be guilty of no unnecessary damage or violence.¹ But in a plea of justification by the sheriff, to an action for breaking the plaintiff's house, and breaking open the inner doors, it is not sufficient to allege, that he entered under a *capias* against one A. B., the outer door being open; and that, the rooms in the house being fastened, and having reasonable suspicion that A. B. was therein, the defendant broke open the same; without averring that A. B. was actually in the house, or that there was a previous demand of admittance; the sheriff being justified, or not, in entering the house of a stranger, by the event.² So a plea, justifying the breaking and entering a house, without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him.³

24. As already stated, the privilege connected with a dwelling-house, and the doors of such house, furnishes no protection against the execution of a writ of *habere facias*, the very precept and purpose of which is, to give possession to a judgment plaintiff of such house belonging to the judgment defendant. It is the duty of an officer, in the execution of such writ, to deliver actual and quiet possession; and for this purpose to remove (using no more force than is necessary) all persons, especially if they claim under the judgment defendant. Hence he may enter by breaking a door which is fastened, without demand of admission, although there are persons then in the house; provided they are there for the purpose of holding possession by force, and of opposing the officer in the execution of his precept, and it does not appear that he knew, or had any cause to suppose, that any person was in the house. And where an officer, in the execution of a writ of *habere facias possessionem* of an undivided part of a house, entered, and, by the direction of the owners of the other parts, who were also the

¹ *Barnard v. Bartlett*, 10 Cush. 501.

² *Smith v. Shirley*, 3 Com. B. 142.

³ *Johnson v. Leigh*, 1 Marsh. 565.

assignees of the judgment, forcibly removed from the house a person entering without right after the entry of the officer; held, the officer was justified, both by the order of such owners, and by the authority of his writ.¹

25. Another important inquiry, in connection with the privileges incident to a dwelling-house, arises in the case of personal violence, committed by the possessor or the alleged owner, each upon the other, in attempting to regain or to hold possession of such dwelling-house. (See vol. 1, pp. 143, 196.) It is held, that a plea of *molliter manus imposuit*, in order to turn the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge for striking the plaintiff repeated blows, and with great force and violence knocking her down several times.²

26. In an action for assault and battery committed upon the plaintiff in his dwelling-house, to a plea that the assault and battery were committed in defence of the possession of a dwelling-house, of which the defendant was seized and possessed, the replication *de injuria*, &c., is sufficient.³ But if the defendant pleads, that the first assault was committed by the plaintiff, and the plaintiff replies, that the defendant broke open the dwelling-house of the plaintiff, and beat him, and that he, in defending himself against the defendant, gently laid his hands on the defendant, which was the same assault in the plea mentioned, concluding with a verification; the replication is bad, inasmuch as it does not aver distinctly, whether the plaintiff or the defendant made the first assault; and, if it means the former, it ought to have confessed and avoided in direct and unambiguous language; if the latter, it ought to have contained a general traverse, concluding to the country.⁴

27. In trespass for assault and battery committed upon the plaintiff in his dwelling-house, the defendant cannot justify, on the ground that he was the owner of the house,

¹ *Howe v. Butterfield*, 4 Cush. 302.

³ *Flagg v. Flagg*, 11 Pick. 475.

² *Gregory v. Hill*, 8 T. R. 299. Acc. Cro. Eliz. 242.

⁴ *Sampson v. Henry*, 11 Pick. 379.

that the possession was unlawfully withheld from him, and that he used no more force than was necessary to enable him to enter, and to overcome the plaintiff's resistance. And where it appeared, that the plaintiff lived in the same house with his son and son's wife, that the defendant broke open the house and beat the plaintiff and his son, that the son's wife was in travail, and that this fact was made known to the defendant before he entered the house; held, the situation of the son's wife was properly admitted in evidence, to show the malice of the defendant, and the aggravated suffering of the plaintiff, although it was not set forth in the declaration; but that the circumstance, that the defendant entered the house for the purpose of making an attachment, was not admissible in evidence in mitigation of damages.¹

¹ *Sampson v. Henry*, 11 Pick. 379.

CHAPTER XVI.

CONVERSION.

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| 1. What constitutes conversion, and the foundation of an action of <i>trover</i> ; unlawful taking, misuse, &c.
4. Conversion in case of <i>bailment</i> .
6. Goods obtained by <i>fraud</i> , or <i>mis-take</i> .
7. Breach of trust.
8. But there must be a conversion to one's own use; not mere negligence or other wrong.
9. Conversion in case of legal process. | 12. Demand and refusal, when sufficient proof of conversion.
13. When insufficient; inability of the defendant to deliver the property; doubt of the plaintiff's title; detention by legal authority, &c.
15. Nature of the property converted; real estate; choses in action, &c.
19. Parties.
22. Pleading.
27. Damages. |
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1. ANOTHER injury to property is *Conversion*. The conversion, by one man, of another's property *to his own use*, is of course involved in a considerable proportion of the wrongs which we have occasion to consider; but it is also of itself constituted by the law a specific wrong, and made the subject of a special action, to wit, the action of *trover*—the French word for *find*. And it may be remarked in general, that as the two propositions, *a trespass is committed*, and *an action of trespass may be maintained*, have the same legal signification; so, in all instances of conversion, *trover* may be brought, and, wherever *trover* lies, there has been a *conversion*. With reference to the action of *trover*, it is said, "In form it is a fiction; in substance, it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes that the defendant might have come lawfully by it, and, if he did not, yet by bringing this action the plaintiff waives the trespass. No damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are

necessary: 1st. property in the plaintiff; 2d. a wrongful conversion by the defendant."¹

2. It has been already sufficiently explained—chapter 10—that, to maintain trover, property—usually proved sufficiently by *possession*—must be shown in the plaintiff. We now proceed to explain the still more distinctive requisite of a *conversion* by the defendant.² (a)

3. It was formerly held, that trover supposes a lawful coming by the goods demanded, and an unlawful conversion; that detention against lawful demand presumes conversion.³ But the prevailing doctrine now is, that trover may be maintained for taking goods, whenever trespass will lie;⁴ (b) that not only a wrongful detention, after demand,

¹ Per Ld. Mansfield, *Cooper v. Chitty*, 1 Burr. 31; 1 Bl. R. 67.

² *Mires v. Solebay*, 2 Mod. 242.

³ *Golightly v. Reynolds*, Loft, 89.

⁴ *Glenn v. Garrison*, 2 Harr. 1.

(a) A special verdict in trover must expressly find the conversion. *Stone v. Waggoner*, 3 Eng. 204.

(b) Where a party becomes possessed of the property of another, for instance, of a wagon, and changes part of its appendages, by substituting whiffletrees and cleaves for those attached to it when it came into his possession; and the owner repossesses himself of the wagon, without knowledge of the change in its appendages; trespass cannot be maintained against him for the substituted articles; the remedy of the party, if any, is by action of trover. *Parker v. Walrod*, 13 Wend. 296.

"If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain *trespass* for the forcible injury; or, waiving the force, he may maintain *trover* for the wrong; or, waiving the tort altogether, he may sue for money had and received." *Rodgers v. Maw*, 15 M. & W. 448.

The distinction between trover and trespass is well illustrated by the following remarks, in a case where a ferryman wrongfully put the horses of a passenger out of the boat, without further intent concerning them; and it was held, that, although the act might be a trespass, it was not a conversion: "Any asportation of a chattel for the use of the defendant or a third person, is a conversion, because it is inconsistent with the general right of dominion which the owner has in the chattel. So, if a man has possession of my chattel, and refuses to deliver it when required, that is evidence of a conversion, because there is an assertion of right inconsistent with my right

but an unlawful taking of the goods of another, with intent to convert them to the use of the taker, or a wrongful assumption of property, is itself a conversion, and not merely evidence of it.¹ So also the misuse of a thing, or the using of a thing without the license of the owner, or a wrongful sale of it.² (a) It is said, that a "person is guilty of a conversion who intermeddles with my property and disposes of it."³ And that trover "only lies, where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion."⁴ So "There must be an

¹ *Clark v. Whitaker*, 19 Conn. 319; *Maguier v. Hawthorn*, 2 Harring. 71; *Harker v. Dement*, 9 Gill, 7; *Farrington v. Payne*, 15 Johns. 431; *Brown v. Woodbury v. Long*, 8 Pick. 543.
² *Per* Ld. *Ellenborough*, *Stephens v. Elwall*, 4 M. & S. 261; *acc.* *Fuller v. Tabor*, 39 Maine, 519.
³ *Per* *Maule, J.*, *Heald v. Carey*, 11 B. Mon. 236.
⁴ *Chapin v. Siger*, 4 McLean, 378; *Com. B.* 993.

of general dominion over it. So of the destruction of a chattel, the effect of which is, to deprive the owner of it altogether. But if an act is done, which does not call in question my general right of dominion over the chattel, but on the contrary, recognizes it, that is no conversion. In the present case, why were the horses removed? Was it not because they were the property of the plaintiff? The act of removal was inconsistent with the plaintiff's right to use them. It may be a wrongful act, for which trespass is maintainable, but it is not a conversion. A trifling injury to a carriage would be a trespass, but it would be monstrous to say, that it would form the ground of an action of trover." *Per* Alderson, B., *Foulds v. Wiloughby*, 1 Dowl. P. C. (N. S.) 86.

(a) Goods taken in the owner's lifetime, and used after his death, are converted in his lifetime. *Crossier v. Ogelby*, 1 Strange, 60,

In many cases, the question of wrongful appropriation of property, so far as the right or title of the true owner is concerned, depends in part upon his knowledge of the unlawful interference. But, with reference to the conversion of personal property, it is held, that the statute of limitations is a bar to an action of trover commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period; the defendant not having practised any fraud, in order to prevent the plaintiff from obtaining that knowledge at an earlier period. *Granger v. George*, 5 B. & C. 149.

intention of the defendant to take to himself the property in the goods, or deprive the plaintiff of it. If the entire article is destroyed, as for instance by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use."¹ And simple *possession*, with a claim of title adverse to that of the true owner, is held sufficient evidence of *conversion*.² Thus where, in trover for a slave, the plaintiff proved that the defendant, a negro dealer, purchased the slave in dispute of the plaintiff's mother, knowing that she had but a life-estate in him, and had possession of the slave a few days afterwards; held error for the Court to instruct the jury, that the plaintiff had not made out a *prima facie* case.³ So taking the property of another by assignment, from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it there in his own name for his principal; and refusing to deliver it to the principal after notice and demand by him; none other than the person in whose name it is warehoused being able to take it out; is a conversion.⁴ And a purchase of property, from one who has no power to sell, where the purchaser takes a delivery of it, and retains the possession, claiming it under the sale, is a conversion of it.⁵ (a) So no demand is necessary, in trover, where the defendant has employed a slave, for some time previous to the suit, in the ordinary domestic avocations, and, upon the trial, asserts a title in himself.⁶ So where a defendant, after

¹ Per Parke, B., *Simmons v. Lillystone*, 8 Exch. 442.

² *Maxwell v. Harrison*, 8 Geo. 61.

³ *Speed v. Heisin*, 4 Mis. 356.

⁴ *M'Combie v. Davis*, 6 E. 538.

⁵ *Hyde v. Noble*, 13 N. H. 494.

⁶ *Powell v. Olds*, 9 Ala. 861.

(a) But if one in possession of property, as apparent owner, sell it, trover does not lie in favor of the true owner against the purchaser, unless the latter assume dominion over the property, after notice of the plaintiff's title. *Parker v. Middlebrook*, 24 Conn. 207.

the accrual of the plaintiff's title and right of possession, having the property in his own hands by purchase from one who had no title, sold it to another, who carried it beyond the plaintiff's reach, and received the purchase-money; it was held a sufficient conversion, although the defendant was not aware of the plaintiff's title.¹ So where the defendant, in the absence, and without the consent or knowledge, of the plaintiff, personally took possession of his house, which had been kept by him as a public hotel and boarding-house, and of the barn belonging to it, and of the property in those buildings, of which the plaintiff was the owner, consisting principally of furniture and provisions suitable for such an establishment; set up and carried on therewith the same business, in his own name, and on his own account; employed clerks and agents for that purpose; took down the sign of the plaintiff, and substituted his own; used and consumed a portion of the property; mingled it with similar articles which he procured for the concern; and, in his own name, also sold and disposed of the remainder, and appropriated the avails to his own use and benefit; and treated the property, in all respects, as if it belonged only to himself: it was held, that these acts constituted a conversion.² So goods were consigned to order, and one of the bills of lading was indorsed by the shipper, who was agent of the owner of the vessel and goods, and was forwarded by the plaintiff, the master of the vessel, to the defendant, who, on the arrival of the goods, had no other right to them. After the arrival of the goods, the owner indorsed the duplicate bill of lading to the plaintiff, and mortgaged the goods to him. The defendant entered the goods at the custom-house, as owner, in opposition to the plaintiff's attempt to enter them, and took them from the vessel under a custom-house permit, the plaintiff being on board and claiming the goods as his own. Held, a conversion.³ So one J. advised the plaintiffs, that

¹ *Harris v. Saunders*, 2 Strobb. Eq. 370.

² *Clark v. Whitaker*, 19 Conn. 319.

³ *Bray v. Bates*, 9 Met. 237.

he had remitted to them \$1969, consigned to L. L. received \$4700, and pledged the bill of lading to the defendant, who received the price of the dollars at the Bank of England, where they were deposited for safe custody, on a sale of them to the bank. Held, that the letter was a sufficient appropriation of the dollars to the plaintiffs; that the plaintiffs and defendant were not tenants in common of the dollars; that, although no specific dollars had been severed for the plaintiff, yet, as the defendant had converted all the plaintiff's and all his own, trover would lie for the plaintiff's share; and that, although the dollars remained in the same unaltered custody, yet, the delivery, by the defendant, of the bill of lading, which was the symbol of them, and the receipt of the value, was a conversion.¹ And a party may be held liable for the conversion of the whole of certain property, of which he has misappropriated only a part. Thus, if a person finds a raft of timber on a sand-bar in a navigable river, high and dry, and takes possession of it, and assumes to dispose of it, hires a person to assist him in removing a part, and sells that person his interest in the remainder, reserving to himself the portion removed; it is a conversion of the whole.² So drawing part of the liquor from a vessel, and filling the vessel up with water, was held to be a conversion of all the liquor.³

4. Upon the general principle already explained, that, if one legally in possession of the personal property of another misuse that property, it is a conversion, and the owner may immediately maintain trover;⁴ the question of conversion often arises between *bailor and bailee*. (a) Upon this sub-

¹ Jackson v. Anderson, 4 Taunt. 24.

² Gentry v. Madden, 3 Pike, 127.

³ Richardson v. Atkinson, 1 Strange, 576.

⁴ Ripley v. Dolbier, 6 Shep. 382.

(a) See *Boothe v. Estes*, 16 Ark. 104. It has been held that trover lies on a count on a bailment, where there is an unlawful detention; even if no bailment is proved. *Marriam v. Yeager*, 2 B. Mon. 339.

ject it is held, that, if a chattel be *gratuitously* left with a person, damages for conversion are not recoverable until demand.¹ But a bailee of goods for hire, by selling them, determines the bailment. And the bailor may maintain trover against the purchaser, though the purchase was *bond fide*.² So a wrongful sale of property by a bailee is a conversion in both the seller and the purchaser, for which the bailor may maintain trover against both.³ Thus, if a mortgagor of personal property, or any one claiming under him, sell the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion, and the mortgagee may maintain trover.⁴ So where the vendee of personal property, under a conditional sale, sells it without performing the condition, his vendor may maintain trover against the second purchaser, without a demand and refusal.⁵ And a wrongful *use* of property by a bailee is a conversion. Thus, where A. hired his slave to B., with a special agreement that he should not be employed "in or about the water," it was held, that the employment of the slave "in or about the water," was a conversion, and, the slave being subsequently destroyed by inevitable accident, that B. would be liable in trover, though no injury occurred at the time of the conversion.⁶ So, where the defendant borrowed a carriage of the plaintiff to use in a particular place, and sent it heavily loaded to another place, whereby the carriage was damaged; it was held a conversion.⁷ So, if an infant take property wrongfully, he is liable in trover; and, if it be bailed to him, and he use it for a different purpose from that for which it was bailed, the bailment is determined, and he is liable in trover.⁸ So, where one hires a horse to go an agreed distance, and voluntarily goes beyond that distance, he is liable for a conversion.⁹ Even, it is held,

¹ Polk v. Allen, 19 Mis. 467.

² Cooper v. Willomatt, 1 Com. B. 672.

³ Buckmaster v. Mower, 21 Verm. 204.

⁴ White v. Phelps, 12 N. H. 382.

⁵ Whipple v. Gilpatrick, 1 App. 427.

⁶ Horsely v. Branch, 1 Humph. 199.

⁷ Hart v. Skinner, 16 Verm. 138.

⁸ Green v. Sperrey, 16 Ib. 390.

⁹ Wheelock v. Wheelwright, 5 Mass. 104; Fish v. Feris, 5 Duer. 49.

though the horse was let on Sunday, in violation of a statute.¹ (See vol. 1, p. 168.) But, if the owner of the horse receives payment for the whole distance travelled, he thereby ratifies the act of the hirer, so that trover will not lie; but, if the hirer has injured the horse by ill usage, the remedy is an action on the case.² So, where the plaintiff delivers his horse to another, to be kept until a note given for the price becomes due or is previously paid; and before the time of payment the horse is sold to the defendant by the bailee, without notice of the plaintiff's claim; and the defendant, after notice of such claim, continues to use and claim the horse as his own after the time limited for the payment of the note; this amounts to a conversion, and the plaintiff may maintain trover without a demand.³ But an unauthorized use of property by the bailee is held not a conversion, unless injury is caused thereby. Thus, where the defendant had the plaintiff's horse for agistment and feeding, and rode him fifteen miles, and the horse died immediately after, but not in consequence of the riding; this was held not a conversion.⁴ And if A. sell to B. sheep, that B. had before leased to A., and at the time of the sale B. knew that they were the same sheep he had leased A., it is not a conversion of the sheep so sold, and B. cannot maintain trover against A. for the sheep.⁵

5. The precise time, at which conversion of property in the hands of a bailee may occur, is sometimes brought in question, in connection with *the statute of limitations*. Thus to an action of trover for wine, commenced October, 1833, the statute of limitations was pleaded. The wine, in pipe, had been deposited by C., for the plaintiff, in the defendant's cellar, by her leave. C. became a bankrupt, and, his assignees claiming the wine, the plaintiff's solicitors warned the defendant by letter, in December, 1826, not to give it up to

¹ Woodman v. Hubbard, 5 Fost. 67.

² Rotch v. Hawes, 12 Pick. 136.

³ Porter v. Foster, 7 Shep. 391.

⁴ Johnson v. Weedman, 4 Scam. 495.

⁵ Downer v. Rowell, 24 Verm. 343.

any person unauthorized by them. The defendant kept the wine, and bottled part of it, at or soon after the end of 1826, at which time it was becoming injured by remaining in the wood. Afterwards, but it did not appear when, she consumed part of the wine so bottled. In November 1827, the plaintiff's solicitors again wrote to the defendant, saying that they were instructed to proceed at law against her, and referring to a demand of the wine, stated in the letter to have been made upon her by them in the preceding March, but of which there was no further evidence. They also offered to indemnify her against the claim of any other person, if she would deliver the wine within a week; in default of which they stated that the proceedings would be commenced. The application was not noticed. A subsequent demand and refusal were proved. The jury having found for the plaintiff; held, on motion to enter a nonsuit, that on this evidence the jury were not bound to conclude, either that there had been a demand and refusal more than six years before action brought; or that the defendant had bottled the wine with intent to convert it to her own use.¹ (a)

6. Where one induces another to enter into a contract and part with his property, either by duress of imprisonment or duress *per minas*, the transaction is void, and no title passes, (b) and a party who assumes the control of property,

¹ Philpott v. Kelley, 3 Ad. & Ell. 106.

(a) With regard to the principle already referred to (p. 248), that misappropriation of *part* of the property will be a conversion of the whole; it was suggested by Patteson and Coleridge, J.'s, that, if a bailee of wine draws off and converts part of it without the owner's knowledge, and at the end of six years is sued in trover for the whole; he cannot set up his conversion of part as a conversion of the whole, to support a plea of the statute of limitations.

(b) So it is held, in New York, that, where a borrower, on obtaining a loan of money at an illegal rate of interest, assigns to the lender bonds and mortgages, in consideration of such loan, the assignment is void, and trover

obtained by him in this way, is liable to the owner in trover, without any previous demand.¹ So the assignee of an insolvent debtor may maintain trover, without proof of demand and refusal, against a vendee of goods, sold by such debtor before he came under the operation of the insolvent laws; if the sale of the goods was fraudulent, if both the vendee and vendor concurred and united in the fraud, and if the vendee converted the goods to his own use. And demand and refusal constitute one mode, but not the only mode, of proving such conversion.² (a) And the question of conversion may also arise in case of *mistake*. Thus, where goods are delivered by a vendor to a carrier, and the carrier, after notice from the vendor to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.³ So goods were shipped at Sunderland, intended to be sent to the plaintiff's agent in London, but by mistake were conveyed to the defendant, who sold part of them, being at that time ignorant of the plaintiff's being

¹ *Foshay v. Ferguson*, 5 Hill, 154.

³ *Litt v. Cowley*, 7 Taunt. 169.

² *Salisbury v. Gourgas*, 10 Met. 442.

may be immediately maintained for them by the mortgagor. *Schroeppel v. Corning*, 2 Seld. 107.

But the declaration must conform to the statute. (2 R. S. 352, § 3.) 2 Comst. 132.

(a) But if goods be obtained from A. by fraud, and pawned to B. without notice, and A. prosecute the offender to conviction, and get possession of his goods; B. may maintain trover for them. *Parker v. Patrick*, 5 T. R. 175.

Where R. asked H. for a loan of \$50, and gave a watch as security, which H. took, and went away, and after about twenty minutes returned, saying that he could not let R. have the money, and that he had not got the watch; and, on being asked by R. for an explanation, he declined to give any; it seems this is not in itself a tortious conversion. But R. might sell the watch, so as to give the purchaser a right to demand it of H., and, on his refusal to give it up without sufficient excuse, to maintain trover for it. *Hall v. Robinson*, 2 Comst. 293.

interested in them. The plaintiff, however, afterwards informed him that they were his property, and directed him to detain them till further orders. Held, the defendant was liable for the amount of those sold, as well as those which remained in his hands undisposed of.¹ So trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only.² But a creditor, who receives in pledge from his debtor the goods of another, supposing them to belong to the debtor; and afterwards permits the debtor to sell and deliver them, on the promise of the purchaser to pay the creditor the price thereof, towards the discharge of the debt; does not thereby render himself liable to the owner in trover.³

7. In addition to the case of *bailment*, already considered, conversion may also consist, generally, in *a breach of trust* in relation to the property by the party in possession of it; whether the suit be brought against him, or one claiming under him. Thus, where a guardian without right sold property of a deceased ward, and the administrator of the deceased brought trover against the vendee, after demand and refusal; it was held, that the demand and refusal were evidence of a conversion from the time the vendee acquired possession.⁴ So, where a hired slave is accidentally lost, while engaged in an employment to which the bailee had no right to put him, it amounts to a wrongful conversion by the bailee.⁵ So A. delivered a horse to B., agreeing with him, that, if B. would do a certain piece of work within a limited time, he should have the horse, but that the horse should remain the property of A. until the work should be completed. B. abandoned the work without completing it, and sold the horse to C., who, upon A.'s claiming the horse, said that A. must look to B. Held, that A.'s right was not divested by the delivery of the horse to B., and that there

¹ Featherstonehaugh v. Johnston, 2 Moore, 131.

² Devereux v. Barclay, 2 B. & Ald. 702.

³ Leonard v. Tidd, 3 Met. 6.

⁴ Dealy v. Lance, 2 Speers, 487.

⁵ Spencer v. Pilcher, 8 Leigh, 565.

was evidence of a conversion of the horse on the part of C.¹ And an unauthorized sale of goods by an *agent* is a conversion, which renders him liable in trover, without a demand, and forfeits his right to a previous tender of the storage.² (a) So where an agent to sell a horse exchanges him for another, it is a conversion, and trover will lie without a demand.³ So, where an agent deposited in a bank a box of specie, belonging to his principal, on general deposit, and took a certificate of deposit in his own name, and subject to his own order; it was held, that a jury were authorized to infer a conversion.⁴ (b) Upon the same principle, when an administrator sells property of his intestate and buys it himself, it is a conversion as to persons having a title to the property.⁵ Or if a factor pledges the goods of his principal for his own debt.⁶ And where a person who had purchased goods of one who had no right to sell, upon a demand by the owner, said he should not deliver them up at present, having bought them of the vendor, supposing them to be his, and afterwards held the goods for the space of seven days, without offering to return them; held, sufficient evidence of a conversion.⁷

8. But, to maintain trover, the defendant must have *converted the property to his own use*; or have done some other act with a *wrongful intent*, expressed or implied. And, without conversion, neither possession of the property, negli-

¹ Houston v. Dyche, 1 Meigs, 76.

² Etter v. Bailey, 8 Barr, 442; Lindley v. Downing, 2 Cart. 418.

³ Ainsworth v. Partillo, 13 Ala. 460.

⁴ Ringo v. Field, 1 Eng. 43.

⁵ Carraway v. Burbank, 1 Dev. 306.

⁶ Kennedy v. Strong, 14 Johns. 128.

⁷ Sargent v. Gile, 8 N. Hamp. 325.

(a) But where goods are deposited with a person, to be sold at not less than a certain fixed price, and the depository sells them at less than that sum, the owner of the goods cannot maintain trover against him, but the proper remedy is an action on the case. *Serjeant v. Blunt*, 16 Johns. 74.

(b) If an agent, having authority to take a note payable to his principal, in discharge of a debt, take it payable to himself, the principal may waive the wrongful act, and claim to have the note delivered to him, and maintain trover for its conversion. *M'Near v. Atwood*, 5 Shep. 434.

gence, nor misfortune will render trover sustainable.¹ Thus, where the petition stated a case of trover and conversion, and the proof was, that the goods were lost by the negligence of the defendant, it was held that the plaintiff could not recover without amending his petition.² So it has been held no conversion, where a shipmaster throws goods into the sea, to save the ship from sinking.³ Or to do a work of charity, or a kindness to the owner, without any intention of injuring the property, or converting it to the party's own use.⁴ So castrating a scrub male hog, running among one's stock, is not such proof of a change of property, as to be evidence of a conversion or appropriation to the defendant's own use.⁵ And it has been held, that, where a person, lawfully coming into possession of the property of another, has parted with it previous to a demand by the owner; the remedy of the owner against him is not by an action of trover, but by a special action on the case, or in assumpsit.⁶ (See p. 28.) So there is no conversion, without a repudiation of the right of the owner, or the exercise of a dominion inconsistent with that right. Thus H., residing in Paris, despatched seven cases of goods by a railway, viâ Dunkirk to London, deliverable to N. or order. One of the cases arrived at Dunkirk, damaged. R., the agent of the railway, and of the Dunkirk and London steamboats in connection with it, had the damaged case inspected according to the law of France, and consigned it to the defendant, the broker for the steamboats in London, to hold at the disposal of N., or order. N. accepted a bill of lading for the case. On its arrival at London, no one having claimed the case within the time specified in the bill of lading, the defendant paid the duty on it, and removed it into a warehouse of B., and B. removed it into another of his warehouses, without the defendant's knowledge. There it was burned by an accidental fire. Held, that, whether the defendant was bound to pay, or

¹ Rogers v. Huie, 2 Cal. 571.

² Duncan v. Fisher, 18 Mis. 403.

³ Bird v. Astcock, 2 Bulstr. 280.

⁴ Drake v. Shooter, 4 Esp. 165.

⁵ Byrne v. Stout, 15 Ill. 183.

⁶ Kelsey v. Griswold, 6 Barb. 436.

justified in paying the duty, or not, there was no conversion by him.¹ So, although every unlawful taking of the chattels of another, with intent to convert them to the use of any other than the owner, and every unlawful taking which destroys or alters the nature of the chattels, is a conversion; the bare removal of the chattels of another, without any intent to deprive him of their possession, and which does not affect their condition, is not a conversion.² And a mere omission of duty is held not to be a conversion. Thus a negro man, employed upon a railroad, asked the agent to let him put A., another negro, in his place for the day, but the agent, finding that A. was a slave, refused. A., however, at the instance of the other negro, got into a car and went seven miles, and assisted some in the work, before he was observed by the agent, who did not force him off then, but let him remain until they went seven miles more to their place of destination. There the agent told the hands in his employ, addressing them by the appellation of "boys," to get down and stop the cars. A. got down among them; but, being inexperienced, blundered and fell, and the wheels of the car, passing over him, gave him a wound of which he soon died. In trover against the railroad company, held, the mere omission to force the slave from the cars, when first discovered, was not of itself a conversion, especially as he could be returned in the cars, with more safety and expedition than he could be got home by being sent afoot; and the acts of the agent were not such as to render either him or the company liable for damages.³

9. And more especially will any slight interference by one person with the property of another not be deemed a conversion, where such interference is connected with the exercise of some right of the former. (a) Thus the plaintiff, a porter

¹ *Heald v. Carey*, 9 Eng. L. & Eq. 429; 11 Com. B. 977.

² *Sparks v. Purdy*, 11 Mis. 219.

³ *Railroad Co. v. Kidd*, 7 Dana, 245.

(a) The plaintiff purchased five negroes of a tenant for life, intending to

on the custom-house quay, put in goods belonging to A., and laid them so that the defendant could not get to his chest without removing them. He did remove them a short distance, and without returning them to their place went away; and the goods were lost. The plaintiff made satisfaction to A. for the goods, and brought trover against the defendant. Held, although the plaintiff had sufficient property in the goods to maintain trover, there was no conversion by the defendant.¹ So, where the plaintiff's goods and servants were on land which the defendant recovered in ejectment, and the defendant, on entering under the writ of possession, turned the servants off the land, and would not let them remain for the purpose of removing the goods; there having been no subsequent demand or refusal, held, the jury might find that there was no conversion.² So, in trover for timber, the pleas were, not guilty, and a justification, that the defendant was possessed of a close, and was digging a saw-pit therein, and, because the goods were put and placed on the close by the plaintiff, without leave or license, and were so buried therein, that the defendant could not make the saw-pit without a little cutting and destroying the said goods, the defendant did necessarily a little cut and destroy them. Replication, *de injuriâ*. It appeared, that several spars, used for bowsprits, were placed on the defendant's land by the plaintiff; that the plaintiff covered them over with earth, and then directed a pit to be dug, and, in order to dig the pit, the spars were unavoidably cut asunder. The premises being close to the river Thames, some pieces of the spars were accidentally washed away. Held, that there was no conversion of the timber; that it was a misdirection to leave to the

¹ *Bushel v. Miller*, 1 Strange, 128.

² *Thorogood v. Robinson*, 6 Ad. & Ell. 769.

run them out of the state, and to defeat the interest of those in remainder. To protect their interests, the defendant seized the negroes. In an action of trover, it was held, that such seizure was not a conversion. *Sharp v. Nesmith*, 6 Rich. 31.

jury the intention of the defendant in making the pit; for, if the timber was wrongfully put on his land, the defendant would be justified in cutting it, if he could not make the pit without doing so, whatever his intention might be; but that the plea was bad, for not stating that the timber was buried by the plaintiff.¹ And, upon similar grounds, trover does not lie against a carrier for negligence, as for losing a box; although it lies for an actual wrong, as if he break it to take out goods, or sell it. And refusal to deliver is no evidence of conversion, if the thing has been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he refused to deliver it, this is good evidence of a conversion.² (a)

10. But the assertion of a claim to personal property, or the wrongful dominion and assumption of property in personal chattels, by one who *threatens* the rightful owner if he attempts to take or remove them; amount in law to a conversion, and are not merely evidence of it. And the party is liable for that which he removed after, as well as before, the institution of the suit.³ (b) Thus where the defendant

¹ *Simmons v. Lillystone*, 20 Eng. L. & Eq. 445.

³ *Hare v. Pearson*, 4 Ired. 76; *Crocket v. Beaty*, 8 Humph. 20.

² *Anon.* 2 Salk. 656.

(a) See *Carrier*. A slave, bequeathed to one for life, and then over, had been carried off, and not heard from for more than seven years before the death of the tenant for life. Held, in an action of trover for the slave, by the ultimate proprietor, after the death of the tenant for life, that a presumption of the slave's death arose, after seven years' absence without being heard from; and that the plaintiff must fail in his action, because there was no proof of property in himself, nor a conversion by the defendant. *Lewis v. Mobley*, 4 Dev. & Batt. 323.

(b) A lessor gave the lessee a written permit to move certain buildings on the premises, and erect others, with a stipulation, that, at the expiration of the lease, the lessee might take away or sell upon the premises the new buildings, after the restoration of the old ones to their original position. A new building having been erected, and the position of the old ones altered, the lease was surrendered. The lessee sold the new building, and the plaintiff, his vendee, before the expiration of the time for which the lease

came into possession of slaves as a loan, and after the death of the lender, and with knowledge of the plaintiff's title, derived by will from the lender, asserted title to the slaves, and declared that he would hold them in spite of them; it was held that this, coupled with user and acts of control, was a conversion.¹ So trover lies, where the owner of the land forbids a purchaser at a sheriff's sale to go upon the land to bring away the goods.² Upon a similar principle, if a party pay money, in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer.³

11. The question of conversion may arise, where goods are seized or detained by *process of law*, or by a legal officer. (See chap. 20 *et seq.*) Thus trover lies against an officer, for goods sold on execution, which are by law exempt from such sale.⁴ Or when property has been taken upon an execution, issued on a judgment void for want of jurisdiction in the court rendering it. Or against any one receiving the property from the officer.⁵ (a) But an officer

¹ Adams v. Mizell, 11 Geo. 106.

⁴ Mandlove v. Burton, 1 Cart. 39.

² Nichols v. Nenson, 2 Murph. 302.

⁵ Martin v. England, 5 Yerg. 313.

³ Shipwick v. Blanchard, 6 T. R. 298.

was given, and without entering on the premises for the purpose of restoration, demanded the new building of the defendant, the grantee of the original lessor, saying that he was the owner of the building, and was ready to comply with all the conditions of the original permit. The defendant replied, that he should hold by force if any attempt was made to remove the building. The plaintiff brings an action of tort for the conversion of the building. Held, no demand was necessary on the part of the lessee, but only a fulfilment of the stipulation in the permit, and, if the lessee was on the premises at the proper time, and attempting to perform the conditions, and was refused that privilege, it might be evidence of conversion; but the lessee having failed to restore the buildings to their original condition, the demand made from a distance was not such evidence. Parker v. Goddard, 39 Maine, 144.

(a) If an officer attaching goods, subject to the lien of a common carrier for freight, pay that freight, that he may get the goods into his possession, in respect to the lien, he stands in the place, and has the rights, of such carrier. But if, on a demand of the goods, he makes an unqualified refusal,

may defend against a claim for conversion, under a judgment, though wrongful. Thus, if A. recover in replevin a parcel of sheep, and B., as the servant and by the command of A., take them, with the assistance of the sheriff's officer, and put them into his master's grounds; a refusal by B. to redeliver them to their true owner on demand is not a conversion, although the judgment in replevin be wrongly given.¹ And the general rule applies to one claiming under legal process, that a mere temporary intermeddling with property, abandoned by the party

¹ *Mires v. Solebay*, 2 Mod. 242.

without any claim of lien, he cannot afterwards set up such lien as a defence to an action of trover for the goods. *Thompson v. Rose*, 16 Conn. 71.

The owner of a horse mortgaged it and delivered possession to the mortgagee. Afterwards the mortgagor assigned his remaining interest to C., and became the servant of C., and the mortgagee permitted C. to make use of the horse. C. and the mortgagor afterwards delivered the horse to S. to be depastured. Afterwards, on July 10th, the mortgagee conveyed his right to the four plaintiffs, and on the same day C. conveyed his right of redemption to three of them. July 18th, the horse was attached, while in the hands of S., in a suit on a note against C. and the mortgagor, brought in the name of the payee, but by the direction and for the benefit of the indorser, the defendant in the present action, and was sold on the execution in that suit, and purchased by the present defendant. In a short time after the attachment, S. was notified by a letter from C., that the horse was sold to the plaintiffs, and he was requested to deliver it to them, of which he informed the nominal plaintiff in that suit, but no such delivery was made. Held, the defendant was liable in trover for the horse, and that the original taking by the defendant was tortious, and therefore trover might be sustained against him without any previous demand. *Hunt v. Holton*, 13 Pick. 216.

And the same question may arise in connection with an *attachment* of property, and not only between the parties to the suit and the officer, but between the latter and his bailee or receiptor. Thus the expression, "we being receiptors," in a written admission of a demand and a refusal to deliver goods, for the recovery of which an action of trover on an officer's receipt for property attached had been brought, was held to be evidence only of the fact that a receipt had been given. And it was also held, that the plaintiff's right to recover must depend upon the tenor of the receipt. *Taylor v. Rhodes*, 26 Verm. 57.

upon a claim made by the owner, is not a conversion. Thus, where a levy was made, under an attachment, on property in the hands of a mechanic, but the officer did not take actual possession; and the plaintiff in the attachment, as soon as he was informed that there was a claim to it by a third person, gave notice to such person that he relinquished all right to the property; held, no conversion.¹ So trover lies against officers of the revenue, for making a wrongful seizure of goods.² As for seizing and carrying away goods for non-payment of duty, if they are not liable to pay it.³ (a) Or where a toll of corn had been customarily taken, by dipping into the sack so as to bring out a certain quantity, and the collector, the defendant, varied from the proper mode, (by sweeping instead of lifting the toll,) so as to take more.⁴ So where a public officer received goods, the detention of which was not justified by an act of parliament, and refused to give them up to the owner without payment of salvage; this was held to be evidence of a conversion.⁵ But a public officer will not be held guilty of a conversion, unless he has wrongfully asserted a claim or title to the property in question. Thus a surveyor of highways lawfully removed wood which was placed within the limits of the highway, and gave notice to the owner where he had put it, and told him he might have it on paying for the removal. Held, no conversion.⁶ So trover may be maintained against a *post-master*, in the courts of New York, for improperly detaining a letter or newspaper addressed to the plaintiff, although such detention is under color of the laws of the United States, and the regulations of the post-office department. But the

¹ *Baily v. Adams*, 14 Wend. 204.

² *Tinkler v. Poole*, 3 Wils. 146.

³ *Chapman v. Lamb*, 2 Strange, 943.
Contra, Etriche v. a Revenue, &c. Bunb.
671.

⁴ *Norman v. Bell*, 2 B. & Ad. 190.

⁵ *Clarke v. Chamberlain*, 2 Galc. 217.

⁶ *Plummer v. Brown*, 8 Met. 578.

(a) In trover, the defendant cannot justify detaining goods, till custom-house duties paid on them without authority are refunded. But the amount so paid may be deducted in damages. *Stone v. Lingwood*, 1 Strange, 651.

conversion should be clearly proved, the withholding shown to be without color of right, and the plaintiff should establish his own title to it by unquestionable evidence.¹

12. As has been already stated, an unauthorized, wrongful, or illegal taking or appropriation of property constitutes *actual conversion*, for which an action lies, without previous demand and refusal.² Thus where there is evidence of a conversion by selling the property, proof of a demand and refusal is unnecessary; although in the first instance the property came lawfully to the defendant.³ And in trover for property obtained by the defendants by an act of trespass, a demand is not necessary.⁴ So where the defendant came into possession of goods wrongfully, no tender is necessary of the amount of freight, &c., paid by him, to enable the plaintiff to maintain trover.⁵ So the plaintiff pawned a watch, and afterwards gave the defendant the duplicate to get it out of pledge. The defendant took it out accordingly, on paying the advance and interest. The plaintiff's agent claimed the watch from the defendant, saying, the plaintiff would of course pay what had been advanced to redeem it. The defendant said he had not got the watch, and would not tell who had. Held, evidence of a conversion to sustain a verdict for the plaintiff in trover, and that the plaintiff was not bound to tender the defendant the sum paid on account of the watch, as the defendant had it not ready to deliver to him in return.⁶ But it now remains to be more distinctly explained, that demand and refusal will furnish a ground of action, although the property was at first rightfully acquired. Upon this point it has been sometimes held, that, where there is proof of a positive and unexcused refusal to deliver, on demand made, the Judge may advise the jury, *as a matter of law*, to find a conversion;⁷ that such demand and refusal are not merely evidence of conversion, but *per se* constitute such conver-

¹ Teall v. Felton, 3 Barb. 512; 1 Comst. 537; 12 How. U. S. 284.

² Carr v. Gale, Daveis, 328; Gentry v. Madden, 3 Pick. 121.

³ Kyle v. Gray, 11 Ala. 233.

⁴ Matheny v. Johnson, 9 Mis. 232.

⁵ Lempriere v. Pasley, 2 T. R. 485.

⁶ Jones v. Cliffe, 3 Tyr. 576.

⁷ Mitchell v. Williams, 4 Hill, 13.

sion.¹ It is, however, the prevailing doctrine, that refusal upon demand is not an actual conversion, but evidence of it;² (a) which, however, is conclusive, if not rebutted or explained.³ And a slight agency on the part of the defendant, in resisting the claim of the owner, is sufficient to sustain a recovery.⁴ And it has been held that a demand by the attorney of the plaintiff, by a letter actually received by the defendant before the action is brought, is a sufficient demand.⁵ So,

¹ Baldwin v. Cole, 6 Mod. 212.

² Morris v. Pugh, 3 Burr. 1243.

³ Magee v. Scott, 9 Cusa. 148.

⁴ Farrar v. Chauffetete, 5 Denio, 527.

⁵ Lovejoy v. Jones, 10 Fost. 164.

(a) Upon this principle, a demand and refusal may be evidence of a *prior* conversion. Thus, where deeds were in the defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term. Wilton v. Girdlestone, 5 B. & Ald. 847.

But, in case of wrongful sale, the conversion of property relates to the time of the sale by which the defendant claims it. Head v. Goodwin, 37 Maine, 181.

And a plaintiff, who had no title to the goods at the commencement of the action, cannot maintain trover for their conversion. Clapp v. Glidden, 39 Maine, 448.

Conversion so far *consists in*, instead of being merely *proved by*, demand and refusal, that if, in trover, there has been a demand and refusal within six years before the bringing of the suit, and there is no other evidence of conversion; the statute of limitations will not bar the action. Collins v. Bowen, 8 Blackf. 267.

Thus an executor left household stuff in the house, by consent of the heir, who used them afterwards. Within six years of the action brought, the executor demanded the goods, and the heir refused to deliver them; whereupon trover was brought, and the Statute of Limitations pleaded. Held, that, the demand and refusal being within six years, the action was not barred. Montague v. Sandwich, 7 Mod. 99.

If there has been a tortious use or taking, a subsequent demand will not operate as a waiver of the conversion, nor entitle the defendant to prove an offer to return upon such demand. Manwell v. Briggs, 17 Vern. 176.

A suit is sometimes considered as in the nature of a demand. But where goods were pawned to secure a debt, it was held, in an action of trover, that a prior suit, brought for the same goods, was no evidence of conversion. Prentiss v. Hannay, 4 Whart. 508.

where an owner of materials puts them into the hands of a bailee, to have work done on them, and then returned, and they come to the possession of the defendant, and the bailee, without special authority from the owner, demands them in order to return them to him, and the defendant refuses to deliver them; this is evidence of a conversion.¹ But a demand must apply to the specific property for the conversion of which the action is afterwards brought. Thus the plaintiff, being entitled to the five best beasts as heriots, marked seven beasts, claiming all as heriots, and left them in the possession of the defendant, who was the owner up to the marking. The plaintiff afterwards applied to the defendant, who still had possession of the seven, for the beasts generally, but the defendant refused to give them up, without qualifying his refusal. Held, no conversion of any of the beasts; the demand having reference to a seizure of seven, and it not being ascertained that any five were legally chosen.²

13. Upon the principle that demand and refusal are only *evidence of conversion*, the effect thereof may be repelled, by proof that compliance with the demand was impossible.³ To maintain trover, the property must be in some way subject to the control of the defendant.⁴ He must have actual or virtual possession;⁵ an interest in or control over the property; more especially if he refuses on the ground that he is not in possession.⁶ Therefore, where a special verdict stated a demand and a refusal, but did not show that the property was in the possession of the defendants at the time of such refusal, there being also other evidence, tending to show that the property was not then in their possession; held, not sufficient to entitle the plaintiff to a judgment.⁷ So the defendant, the widow and administratrix of an insolvent, being applied to by his assignees for

¹ 3 Fost. 444.

² Abington v. Lipscomb, 1 Ad. & Ell. N. S. 776.

³ 1 Comst. 522; Rowman v. Eaton, 24 Barb. 528; Dietus v. Fuss, 8 Md. 148.

⁴ Yale v. Saunders, 16 Verm. 243.

⁵ Traylor v. Horrall, 4 Blackf. 317.

⁶ Morris v. Thomson, 1 Rich. 65.

⁷ Hill v. Corill, 1 Comst. 522.

some papers which had been in his possession at the time of his decease, answered that they were in the hands of her attorney. Held, not sufficient evidence of conversion.¹ And, under some circumstances, a mere passive neglect or omission to comply with a demand will not constitute a refusal. Thus the plaintiff hired to B. a wagon, which B. traded away to C., who drove it to the premises of the defendant, and left it there. The plaintiff called on the defendant for the wagon, and the defendant showed it to him, and said that C. had left it there, and that by the trade between B. and C. he thought the plaintiff had lost his title. The plaintiff made an affidavit, stating the facts, and that the wagon was in C.'s possession, which he read on the defendant's premises, and demanded the wagon, to which the defendant replied, "C. has no possessions here, these are my possessions." Held, no conversion.² So the demand may be insufficient, in requiring the defendant to restore the property in a form which has become impossible, although in consequence of the defendant's own act. Thus the bailee of a gun overcharged and burst it. The owner required him forthwith to deliver it back in the same good plight in which he received it; but the bailee refused to do the repair, and did not return it. Held, not evidence of conversion.³ And a mere refusal by the defendant to deliver to the plaintiff a chattel of his, which is on the defendant's premises, is not evidence of a conversion; though it is otherwise with a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel.⁴ So, where a chattel was sold and a bill of sale given, and the seller agreed to send the chattel to the buyer by boat, and he delivered it at the wharf, but never sent it; whereupon the buyer demanded a delivery, which was refused, but he knew where the article was and might have taken it;

¹ *Canot v. Hughes*, 2 Bing. N. R. 448.

² *Ragdale v. Williams*, 8 Ired. 498.

³ *Rushworth v. Taylor*, 3 Ad. & Ell. N. S. 699; 3 Gale & Dav. 3.

⁴ *Wilde v. Waters*, 32 Eng. L. & Eq. 422.

held, no conversion, and that the remedy of the buyer was on the contract.¹ So, although one in possession of the property of another must surrender it on the demand of the owner; if he does not know the applicant to be the owner, he has a right to reasonable proof of that fact.² And even though he received the property from the plaintiff, he may sometimes show in defence the title of a third person. Thus a warehouseman, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another.³ And although, in general, in trover, a defendant cannot give in evidence his answer to a demand; yet, where a demand is made by an agent, and the defendant insists upon the production of his authority, and declines a delivery until then, there is no conversion; and his excuse may be given in evidence.⁴ So where goods, the property of the plaintiff, had been, by the servant of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them, refused to do so without an order from the company; held, not a conversion.⁵ So F., who had hired a ship and its tackle of the plaintiff for three voyages, at the end of the first, apprehending a seizure under the process of an admiralty court, placed the cables and anchors on the defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process, without the anchors and cables. Two days before the sale, the plaintiff demanded of the defendant the anchors and cables on his wharf, which the defendant, holding them from F., refused to give up. Held, that on this demand, previous to the sale, the plaintiff could not sue the defendant for the anchors and cables in trover, although they had not been

¹ Roll v. Black, Dudley, 18.

² Dowd v. Wadsworth, 2 Dev. 130.

³ Ogle v. Atkinson, 5 Taunt. 759.

⁴ St. John v. O'Connel, 7 Port. 466.

⁵ Alexander v. Southey, 5 B. & Ald. 247.

removed out of the ship.¹ But, on the other hand, a party cannot discharge himself of his liability for conversion, by assuming a gratuitous and unauthorized liability to a third person. Thus the vendor of tin shipped it on board a vessel bound to Leghorn, by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at Leghorn. The tin, being heavy, was placed at the bottom of the hold, with other goods over it. The vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the freight, or offer to make any compensation to him for the trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person. Held, that this was sufficient evidence of a conversion.² And a party holding property, and refusing to deliver it on demand made, because he doubts the authority of the person making such demand, must place his refusal distinctly upon that ground; otherwise the refusal affords presumptive evidence of a conversion.³ Thus, where one receives a chattel, under a stipulation in writing that he will return it "whenever called for, in good repair, and free from expense;" he must deliver it on demand, or excuse the non-delivery. If, when demand is made by a third person, in whose hands the writing was placed for that purpose, the bailee does not call on him to produce his authority, but places his refusal upon the ground that the chattel had been removed from his possession by some other person; he cannot object in his defence to an action of trover, that the agent did not show an authority when the chattel was demanded.⁴ So, where the plaintiffs sold goods to A., who paid for them and was to take them away, but, the defendant becoming possessed of the place in which the goods were deposited, the plaintiff's attorney, accompanied by A., demanded them of the defendant, telling him that they

¹ *Ferguson v. Christal*, 5 Bing. 305.

⁴ *Spence v. Mitchell*, 9 Ala. 744; 27

² *Thompson v. Trail*, 6 B. & C. 36. *Miss.* 362.

³ *Ingalls v. Bulkley*, 15 Ill. 224.

belonged to the plaintiffs, and that they had sold them to A.; to which the defendant answered, that he would not deliver them to any person whatsoever; and afterwards the plaintiffs repaid the money to A.; held, that this demand and refusal were sufficient evidence of a conversion, without a new demand by the plaintiffs, after they had repaid the money to A.¹ But, if delay is asked for the purpose of obtaining legal counsel, a reasonable time will be allowed for this purpose, before conversion. Thus in trover against an executor, it appeared that the watch, which was the subject-matter of the action, had been given by the testatrix to one S. in September, 1837; that S. redelivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff in December, 1838, the testatrix said that she would consult her solicitor; and that the testatrix died in March, 1839. Held, sufficient evidence of a conversion within six months before the death.²

14. The conversion of goods, consisting in refusal to deliver them upon demand, may be denied or justified upon the ground of *legal authority*. Thus the seizure of goods fraudulently purchased, on regular process in favor of a creditor of the vendee, is not a tortious act, and a demand by the vendor, accompanied by a statement of his title, is necessary to sustain trover against the officer. But if, upon such demand, there is an unqualified refusal by the officer to deliver the goods, without requiring any evidence of the vendor's title, or expressing any doubts concerning it; the jury may presume a waiver of any information on that subject.³ So a demand and refusal are not conclusive proof of a conversion, when goods are *attached* in the hands of the defendant.⁴ And there are other cases, in which a refusal to deliver property on demand may be justified, upon the

¹ Pattison v. Robinson, 5 M. & S. 105.

² Richmond v. Nicholson, 3 Scott, 134.

³ Thompson v. Rowe, 16 Conn. 71.

⁴ Garvin v. Lattrell, 10 Humph. 16.

ground of legal authority. Thus A. sued B. in trespass for taking a filly. B. justified, that the filly belonged to the plaintiff, and was taken by the plaintiff's command. Verdict for A., with damages, subject to an award by the defendant, one of the jurors, to whom the filly was delivered, with the consent of A. and the plaintiff, in order that the defendant might determine in a given time, whether the filly was marked with a certain scar; in case the scar should appear, the verdict for A. to stand. The defendant, by his award in due time, stated that the scar had appeared, and ordered the verdict to stand. Ten days after, the plaintiff, without authority from B., demanded the filly of A., who refused to deliver it; and a month afterwards the plaintiff sued the defendant in trover for the filly. Held, that this detention of the filly by the defendant did not amount to a conversion.¹ So, in trover for a chaise, it appeared that a third person had hired it from the plaintiff, and afterwards left it for sale at the defendant's repository for carriages in London. While there, it was attached by process out of a city court against a third party; after which, the plaintiff demanded it from the defendant, who refused to deliver it, on the ground, that under the circumstances he should be liable for its value if he gave it up. Held, there was no evidence of a conversion, the chaise being at the time of demand in the custody of the law.² So a vessel and her cargo were seized and libelled by a collector for breach of the revenue laws. Upon petition, a *remittitur* was granted by the Secretary of the Treasury, and an order for the restoration of the property issued from the District Court. But the secretary, upon further consideration, being satisfied that the claimant was not entitled to relief, wrote to the District Attorney to return the certificate of *remittitur*, that it might be revoked; of which orders the collector was notified, and for which cause, upon demand by the deputy marshal, under the order for

¹ *Gunton v. Nurse*, 2 Brod. & Bing. 447.

² *Verral v. Robinson*, 5 Tyr. 1069; 1 Gale, 244.

restoration, the collector refused to deliver the property. Afterwards the *remitter* was revoked, and the owner obtained possession of the property, under an order of the court, by giving a bond therefor, and brought trover against the collector. Held, the property, in the hands of the collector, was in the custody of the law, and his refusal to deliver it was not a conversion; and that the plaintiff, having admitted, by his petition to the court, and by the giving of the bond, that it was so in the custody of the law, was estopped from charging the collector as a wrongdoer. Also, that, if a portion of the property were abstracted, the plaintiff could not maintain trover against the collector therefor; and it seems, that his remedy should be sought in the court which ordered the restoration.¹ But trover lies for a horse, seized under pretence of necessity for the public service, and withheld after demand, made subsequent to the termination of such exigence.²

15. *Conversion*, as has been already explained, is an injury particularly confined to personal property. But the question has sometimes occurred, whether movable articles connected with the realty can be sued for in *trover*.³ (See chap. 9.) Upon this point it is held, that the *cutting of timber*, without carrying it away, is a conversion.⁴ (a) So, where wood has

¹ Barnes v. Taylor, 29 Maine, 514.

⁴ Sanderson v. Haverstick, 8 Barr,

² Fryer v. M'Rae, 8 Port. 187.

294.

³ See Whidden v. Seelye, 40 Maine, 247.

(a) Certain lands, together with the woods, &c., were conveyed under a marriage settlement to the plaintiffs, their heirs and assigns, during the life of A., in trust, to pay the rents and profits as she should appoint during her life; and after her decease, to the use of such child or children of the marriage, and in such shares as she should appoint, and for want of appointment, to the use of the children equally, &c., and the heirs of their bodies, with cross-remainders; and, in default of such issue, to the use of the right heirs of A. forever. Held, that the plaintiffs could not maintain trover against the defendant, a stranger, for certain trees, which had been cut down by order of the husband of A., and carried away by the defendant Blaker v. Anscombe, 1 New Rep. 25.

been converted, and made into coal, by the defendant, the owner may maintain trover for the coal.¹ So trover may be maintained by the owner of land, for the recovery of crops raised thereon, without license or authority.² So trover lies for cutting and carrying away corn standing and growing.³ Or for a building, standing, as personal property, upon another's land, which he refuses to deliver.⁴ Or against the *bond fide* purchaser of loads of earth taken from the plaintiff's land.⁵

16. Another questionable subject of the injury of conversion consists of *choses in action*. (See i. 53.) In general, it is held that no person can maintain trover for a chose in action, but the legal owner.⁶

17. Trover lies for a *bond*, and for *Letters-Patent*.⁷ In reference to *judgments*, it is held that trover cannot be maintained for a judgment, nor a note, which is the subject of a judgment.⁸ And, though judgments rendered by justices are not records, they are muniments of the rights of both parties, by judicial determination. And the party in whose favor such judgment is, cannot maintain trover for it.⁹ But the rule, that trover will not lie for a record, applies to the record, strictly so called, which is made and preserved by public authority, and not to such papers as have relation to

¹ Riddle v. Driver, 12 Ala. 590.

² Simpkins v. Rogers, 15 Ill. 397.

³ Nelson v. Burt, 15 Mass. 204.

⁴ Pullen v. Bell, 40 Maine, 314.

⁵ Riley v. Boston, &c. 11 Cush. 11.

⁶ Webster v. Heylman, 11 Mia. 428.

⁷ Pickering v. Appleby, 1 Com. 355.

⁸ Platt v. Potts, 11 Ired. 266. But see Hudspeth v. Wilson, 2 Dev. 372.

⁹ Cobb v. Cornegay, 6 Ired. 358.

The purchaser of land on an execution, after receiving the sheriff's deed, may bring trover for the timber which had been cut by the defendant, while he remained in possession after the sale. *Rich v. Baker*, 3 Denio. 79.

It has been seen (chap. 9) that similar questions may arise in relation to *fixtures*. In a late case, a ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of his term; the ladder and crane being fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench fixed to the wall. Held, in the absence of anything to show that they were put up for purposes of ornament or trade, trover would not lie for them. *Wilde v. Waters*, 16 Com. B. 637.

the record, but are not parcel of it. Therefore a judgment creditor may sustain trover for a writ of execution, which he has sued out upon his judgment, although the execution may have expired previous to the commencement of the action; since its absence from the office whence it issued might embarrass the plaintiff in procuring a fresh execution upon the judgment, and might even create a presumption that the judgment had been satisfied.¹ So a debtor, who has made copies of his creditor's account against him, may, if the creditor obtain possession of such copies, and refuse to redeliver them to the debtor, sustain trover therefor against the creditor.² And a refusal to redeliver to the owner a written account, which he has presented for payment, is a conversion; even though nothing was due. And the measure of damages is the apparent amount due.³ (a)

18. In reference to notes and other negotiable securities, trover will lie for a promissory note in the hands of a third person.⁴ So it is held that trover may be maintained for a note which has been paid, and left by mistake in the hands of the holder, unless the fact of payment is denied by the

¹ Keeler v. Fassett, 21 Verm. 539.

² O'Donoghue v. Corby, 22 Mis. 394.

³ Fullam v. Cummings, 16 Verm. 697.

⁴ Todd v. Crookshanks, 3 Johns. 432.

(a) See Symonds v. Atkinson, 37 Eng. L. & Eq. 585; Perley v. Dole, 40 Maine, 139. Under some circumstances, although an action may be maintained for conversion of a *chose in action*, only nominal damages will be recovered. Thus A. effected an insurance on the life of B., and, after an act of bankruptcy, assigned the policy to the defendant, who was aware of A.'s circumstances at the time. On the death of B., it was discovered that his life was not insurable. On a memorial presented by A. to the company, they ordered half the sum, for which B.'s life was insured, to be paid as a gratuity, which the defendant received, and the policy was then cancelled, and remained in the hands of their officer. In an action of trover, brought by the assignee of A. against the defendant, to recover the value of the policy; held, that he was only entitled to the parchment on which the policy was written, and not to the sum paid by the company to the defendant, as it was a mere gratuitous and voluntary payment. Wills v. Wells, 2 Moore, 247.

holder.¹ And, where the defendant had left the note with an attorney, a demand of an order on the attorney for the note, and the refusal of the defendant to give such order, contrary to his duty, is sufficient evidence of a conversion.² (a) So where a written agreement, dated 2d September, 1808, between A. and B., stated, that A. thereby delivered to B. a certain promissory note of C., for two hundred bushels of wheat, valued at \$200, payable in February, 1811, and engaged, in case the wheat did not sell for \$200, to make up the deficiency; and B. thereby gave to A. the power of redeeming the note, by paying \$186 with $3\frac{1}{4}$ per cent. interest, any time within six months of the time the note was payable; it was held, that the note was deposited as a pledge, and not as a mortgage, and that a tender by A. of the \$200, on or before the day the note fell due, was sufficient to entitle him to a return of the note; and on such tender, and a refusal by B., A. might maintain trover for the note.³ So the collection of a note, by a person not entitled to it, is evidence of a conversion.⁴ And in such case trover lies against the promisor to whom the note has been given up. Thus the holder of a note, being about to leave his home, left the note in the care of his son, whom, with notice to the maker, he directed not to receive payment in his absence. But, the promisor coming, and insisting upon paying the sum due, the son received it, and delivered him the note, which was not then payable. Held, the owner might maintain trover for the note against the promisor.⁵ So bills, indorsed

¹ *Pierce v. Gilson*, 9 Verm. 216.

Contra, *Todd v. Crookshanks*, 3 Johns. 432. (See p. 274.)

² *Bissel v. Drake*, 19 Johns. 66.

³ *McLean v. Walker*, 10 Johns. 471.

⁴ *Donnell v. Thompson*, 12 Ala. 440.

⁵ *Kingman v. Pierce*, 17 Mass. 247.

(a) But where A., the indorser of a dishonored bill, having paid the amount to B., the holder, demanded the bill from B., who referred him to his (B.'s) attorney; and, A. refusing to go to the attorney, B. said, "Then call on Saturday, and in the mean time I will get it for you;" and A. called on Saturday, but did not obtain the bill; held no evidence of a conversion. *Towne v. Lewis*, 7 Com. B. 608.

to an agent of the plaintiffs or order for their account, and deposited with the defendants by such agent as a security for future advances, may be recovered by the plaintiffs in an action of trover.¹ But trover has been held not to lie for the conversion of a promissory note, after it has been paid or legally discharged in any manner. Otherwise, if the note has not been paid or legally discharged, although the word "paid" has been written across the face of it by mistake, or by one without authority.² Nor will trover lie for a note payable to the plaintiff, which has been delivered to A. to collect, and to apply the amount received thereon to the payment of a note which he held against the plaintiff.³ And upon the general subject of the conversion of negotiable securities it is said, the rules and principles of law, applicable to the conversion of a chattel, are not always applicable to the conversion of a negotiable instrument, held by a person who is a party to it, and apparently its holder. And if the drawer of a bill, who is also in possession of it as the agent of, and in trust for, the legal holder, but authorized by him to receive the proceeds in a certain way, transfers it to a third party, who makes an advance of money upon it, and receives the bill in ignorance of the true state of the case, and believing it to be the property of the transferror, the receipt of the proceeds by the transferee, (even in a manner not authorized by the legal holder,) as it would not have been an act of conversion by the transferror, will not be a conversion by the transferee, though followed by the appropriation and retention of the proceeds in discharge of his advance to the transferror; at all events, if the bill has been given up, on its satisfaction, to the acceptors, and no demand of it has been made until afterwards upon the transferee. But, it seems, a demand and refusal of it, while in the hands of the transferee, would have been evidence of a conversion by him; and in that case he would have been liable to the legal holder.⁴ So, where

¹ *Truettell v. Barandon*, 1 Moo. 543.

⁴ *Symonds v. Atkinson*, 37 Eng. L.

² *Lowremore v. Berry*, 19 Ala. 130.

& Eq. 585.

³ *Canfield v. Monger*, 12 Johns. 347.

bills were delivered by a trader in contemplation of bankruptcy to the defendant, a creditor, with a view of giving him the preference, and paid to him after the bankruptcy; held, in trover by the assignees, the receipt of the money was not a conversion; and therefore that it was necessary for them to prove a demand and refusal, before the bills became due.¹

19. With regard to the *parties* in an action of trover, it is held that trover lies against *an infant*, when the goods converted came to his possession by a prior illegal contract.² So, on the other hand, an infant, who makes a sale of personal property without fraud, may rescind the sale. But he must restore the property, or the consideration received, before he can maintain his action for the property sold. And if, before a rescission, the purchaser makes a *bond fide* sale of the property, trover will not lie against him.³

20. The purchaser of property, tortiously in the hands of a third person, may after demand maintain trover therefor.⁴ It is said, although a mere right of action for a tort is not assignable, yet, after the conversion of a chattel, the owner may sell the chattel itself, so as to give the purchaser a right to reclaim it from the wrongdoer, or maintain trover for it, after demand made in his own behalf.⁵ Thus, where A. turned cattle into the woods, and B., thinking one of them to be his, took possession of it, after which A., ignorant of B.'s possession, sold it to C., who was also ignorant of it; held, C. might sue B. in his own name.⁶ So where the defendant, in the absence of the plaintiff, but at the proper day, set apart property in satisfaction of a contract, of which the plaintiff was the legal assignee and known to be so by the defendant, and there was a subsequent conversion of the property, on the same day, by the defendant; held, the plaintiff had sufficient property and possession to maintain trover.⁷

21. A receiver of an insolvent corporation, who is empow-

¹ Jones v. Fort, 9 B. & C. 764.

² Lewis v. Littlefield, 3 Shep. 233.

³ Carr v. Clough, 6 Fost. 280.

⁴ Cartland v. Morrison, 32 Maine, 190.

⁵ Hall v. Robinson, 2 Comst. 293.

See Gardner v. Adams, 12 Wend. 297.

⁶ Morgan v. Bradley, 3 Hawks, 559.

⁷ Seward v. Heflin, 20 Verm. 144.

ered by law to sue for and recover "all the estate, debts, and things in action, belonging to the corporation," may maintain trover for the conversion of the personal property of the corporation before he was appointed receiver.¹ So trover can be maintained by an assignee, for the property of an insolvent debtor, which he refuses to deliver.² So trover can be maintained by an administrator, in all cases where the intestate would have had a right of action.³

22. In reference to the declaration for a conversion of property; trover *pro diversis aliis bonis* has been held good.⁴ Or for *plate*, generally. Or two hundred and sixty pieces of silver.⁵ Or "pieces of ends of boards."⁶ Or *de decem ponderibus*, Anglice "weights."⁷ Or twenty ounces of cloves and mace, though not shown how much of each, or that they were mixed.⁸ Or a piece of tepee, without saying how many yards it contained.⁹ So trover for "old iron," without saying what quantity, is good after verdict.¹⁰ So trover for "ten pair of curtains and valons" is, after verdict, sufficiently certain.¹¹ Or "ricks of hay."¹² And a state of demand in an action styled trespass, charging "that the defendant took in his possession certain goods and chattels the property of the plaintiff, that he refused and still refuses to deliver them to the plaintiff though requested, and has converted them to his own use;" sets out a case of trover.¹³ But where personal property, the subject of an action of trover, is described as "certain goods, to wit, a lot of goods in a store of A.;" the description is held not sufficiently certain.¹⁴ And where an action of trover was brought for a slave called John, and there was proof of the conversion of a slave, but no proof that his name was John, it was held that the plaintiff could not recover.¹⁵

¹ Gillett v. Fairchild, 4 Denio, 80.

² McLeish v. Tylee, 4 Strobb. 287.

³ Smith v. Grove, 12 Mis. 51.

⁴ Procter v. Burdet, 3 Mod. 70.

⁵ Campbell v. St. John, 1 Salk. 219.

⁶ Knight v. Barker, 11 Mod. 66.

⁷ Hook v. Galloway, 12 Ib. 3.

⁸ Hartford v. Jones, 2 Salk. 654.

⁹ Radley v. Rudge, 2 Str. 738; acc.

Bottomly v. Harrison, Ib. 809; Haslegrave v. Thompson, Ib. 810; White v. Graham, Ib. 827.

¹⁰ Talbott v. Spear, Willes, 70.

¹¹ Taylor v. Wells, 1 Mod. 46.

¹² Wood v. Davies, Ib. 290.

¹³ Glenn v. Garrison, 2 Harr. 1.

¹⁴ Edgerly v. Emerson, 3 Fost. 555.

¹⁵ Ward v. Smith, 8 Ired. 296.

23. In trover for promissory notes, the plaintiff need not state the dates or times of payment, he being presumed not to have them in his possession.¹ But, where a second count in trover for notes described them as "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the promissory notes in the first count mentioned;" it was held bad on special demurrer.² So where the note was described in the declaration to be for one hundred and eighty dollars, and the note proved to be in possession of the defendant was for three hundred dollars, the variance was held fatal; although the declaration alleged, that the note in question was to pay to the plaintiff or his order a certain sum of money, to wit, one hundred and eighty dollars.³ But, if the plaintiff cannot state the precise amount of the note, he may state that it was of great value, to wit, of the value of a certain sum.⁴ (a)

24. In reference to the pleadings subsequent to the declaration, if the plaintiff's interest in the goods be not sufficient to sustain the suit, the proper plea is not guilty. And no special plea in bar can be good, unless it confess and avoid the conversion.⁵ The statement of demand, in a suit by an administrator in a justice's court in Indiana, was substantially, that the defendant on, &c., had "swapped" a certain bay horse to A. the intestate, and delivered the horse to him; and that the defendant afterwards took the horse into his possession, without the plaintiff's consent, and converted him to his own use, &c., to the plaintiff's damage, &c. Held, a sufficient statement in trover, and that it was too late after a plea to the merits to object to the statement of

¹ The Receivers v. Neilson, 3 Green, 337.

² Ibid.

³ Bissel v. Drake, 19 Johns. 66.

⁴ Ibid.

⁵ Coffin v. Anderson, 4 Blackf. 395.

(a) In trover for a promissory note, it is not necessary to give notice to the defendant to produce the note. If shown to be in his possession or under his control, the action is notice. Bissel v. Drake, 19 Johns. 66.

demand.¹ But, in New York, in an action for conversion, an answer, which denies each and every allegation in the complaint, is a denial not only of the conversion, but of the plaintiff's title; and under it evidence that the plaintiff had no title to the property is admissible.²

25. The plaintiff having proved a taking of the goods from his premises by the defendant, and a subsequent demand and refusal, the defendant may prove, under "not possessed," that the plaintiff's wife, with his authority, gave the goods to the defendant in discharge of a debt due to him from the plaintiff.³

26. Trover by the assignee of A., an insolvent, for ten sets of harnesses, ten horses, &c. The defendant pleaded that the plaintiff, as assignee, was not lawfully possessed of the goods, &c., as of his own property as assignee; and also a plea, stating that, before the insolvent petitioned for his discharge, the defendant sold and delivered to him divers horses and harnesses, being the same as those mentioned in the declaration, for £150, on the terms that the defendant might at any time, until payment of the price, take and retain the horses and harnesses as a pledge and security for such part of the price as should remain unpaid, until payment thereof; that at the time of the alleged conversion, £22, part of such price, remained due; and that, after the plaintiff became possessed as assignee, the defendant took the said horses and harnesses into his possession as such pledge and security, &c.; which is the conversion in the declaration mentioned. To this plea the plaintiff now assigned, that the action was brought, not for the supposed conversion in the plea mentioned, but for the conversion of ten sets of harnesses, ten horses, &c., other than and different to those in the plea mentioned, &c.; to which the defendant pleaded not guilty. Held, that the plaintiff was entitled, under the new assignment, to give in evidence a conversion by the defendant of

¹ Davis v. Davis, 6 Blackf. 394.

² Robinson v. Frost, 14 Barb. 536.

³ Bingham v. Clements, 12 Ad. & Ell. N. S. 260.

five horses, two of which were, and three were not, the subject of the agreement stated in the plea.¹

27. The measure of *damages* (a) in an action of trover, is the value of the property at the time of the conversion, and interest thereon; and the jury may make the highest value proved the measure of damages.² So, although before the conversion the plaintiff as vendee paid the defendant for the article, and the defendant before the trial resold it at an advanced price.³ But, to enable a jury to assess damages for illegally taking and detaining property, and to authorize a verdict therefor, evidence should be offered of the value of the property; or such description thereof, as will enable the jury to determine the value from their own knowledge.⁴

28. The question has often arisen, whether a party, who has once done an act which might amount to conversion, can avoid his liability therefor by subsequent restoration of, or satisfaction for, the property. Thus, where the defendants had in their possession a boiler belonging to the plaintiffs, and the plaintiffs demanded it, and the defendants at first refused to restore it, but afterwards, and before the issuing of the writ, tendered it; held, no conversion.⁵ So, if a slave is hired for a particular service, and is afterwards employed in a different one, this is a conversion; but if, with full knowledge of the conversion before the expiration of the term, the master receives the stipulated hire for the entire term, he is estopped from afterwards bringing trover.⁶ So where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them, and the plaintiffs accepted the goods without condition; held, they could not

¹ Bolton v. Sherman, 2 M. & W. 395.

² Ryburn v. Prior, 14 Ark. 505; 459. Wilcox v. Conin, 2 Johns. 280.

³ Kennedy v. Whitwell, 4 Pick. 466.

⁴ Pharis v. Carver, 13 B. Mon. 236.

⁵ Hayward v. Seaward, 1 Moo. & S.

⁶ Mosely v. Wilkinson, 24 Ala. 411.

recover in the action more than nominal damages; at all events, not without alleging special damage.¹ So a cow, going at large in the highway without a keeper, joined a drove of cattle, without the knowledge of the driver, the defendant, and was driven to a distant place, and there pastured with the other cattle. The plaintiff, the owner of the cow, called on the defendant, after his return, made inquiries, and demanded the cow, and, on the return of the drove a few months afterwards, the defendant delivered the cow to the plaintiff, who received her. Held, the omission to deliver the cow on demand was not evidence of a conversion.² But the general doctrine is laid down, that a temporary conversion will render a defendant liable; for a conversion which has once taken place cannot be cured; although a redelivery after conversion may go in mitigation of damages.³ So, where personal property is sold, on condition that the title shall not vest until payment of the price, if, after the time of payment has expired, the price not being paid, a creditor of the vendee attach the property; he cannot defeat the vendor's right to an action of trover for the property, by tendering to him the price and interest. And in such action brought against the attaching creditor, the rule of damages is the value of the property at the time of the attachment.⁴ So the defendant in trover cannot justify the detaining goods, for money laid out upon them without authority; but it may be deducted in damages.⁵ So, where the plaintiff in trover unconditionally receives the goods in question, after suit brought, he is nevertheless entitled to recover the excess in value at the time of conversion above the value at the time of delivery, without an averment of special damage.⁶ (a)

¹ Moon v. Raphael, 2 Bing. N. R. 310.

² Wellington v. Wentworth, 8 Met. 548.

³ St. John v. O'Connell, 7 Port. 466.

⁴ Buckmaster v. Smith, 22 Verm. 203.

⁵ Stone v. Lingwood, 1 Str. 651.

⁶ Rank v. Rank, 5 Barr, 211.

(a) In this connection we may refer to certain points of *practice* in the

English and American courts, more particularly relating to the action of trover. It has been held, that the Court will not stay proceedings in an action of trover, on the terms of the defendant's delivering up the goods to the plaintiff, or paying their value, where such value is not ascertained. *Tucker v. Wright*, 11 Moore, 500.

And, in trover for money, the Court gave leave to bring the whole money declared for into Court; but said they could only do it in this case, and not in trover for goods. *Anon.* 1 Strange, 142.

CHAPTER XVII.

FRAUD.

- | | |
|--|---|
| 1. Must be connected with <i>contract</i> .
2. General principles; what constitutes an actionable fraud.
5. Fraud of a <i>seller</i> .
7. Fraud of <i>purchaser</i> ; whether cred- | itors and subsequent purchasers are affected by such fraud; when a seller loses his right of action.
11. False recommendation of credit, &c. |
|--|---|

1. ANOTHER tort or wrong to *property*, is *Fraud*. This, from its very nature, can exist only in connection with some form of *contract*, and was therefore incidentally considered at some length under the head of *torts as connected with contracts*. (See chapter 1.) Moreover, fraud is much more frequently set up as a defence to a suit at law, or in equity relied upon as a ground for rescinding or setting aside an executed or executory agreement, than made the foundation of a distinct action for damages. For these reasons, it does not require to be noticed, in the present connection, at great length.

2. Fraud or deceit, accompanied with damage, is a good cause of action.¹ And where one party designedly produces a false impression, in order to mislead, entrap, or obtain undue advantage over another, there is fraud,—an evil act, with an evil intent.² Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue unconscientious advantage is taken of another.³ It is often a *conclusion of law*, which courts will infer from acts and circumstances, whether the

¹ Barney v. Dewey, 13 Johns. 224.

² Gale v. Gale, 19 Barb. 249.

³ Peter v. Wright, 6 Ind. 183.

existence of a fraudulent purpose, in the strict sense, be proved or not.¹ But fraud is not to be presumed from the provisions of an instrument which admits of a contrary construction.² And it is said, *fraud is never to be presumed*; it must be *clearly proved* by the party making the charge, for the presumption of law is always against bad faith.³ And it is to be further remarked, that the law will not lend its aid to either of the parties to a fraudulent executory contract in enforcing the same, nor to rescind or disturb one which has been executed; founded in immorality, or upon transactions forbidden by law.⁴ (See chap. 4.)

3. In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood, with the design to deprive the plaintiff of a benefit and acquire it to himself; and damage naturally flowing from the plaintiff's belief. Thus a declaration in case stated, that the plaintiff was a printer of silk goods, and had delivered to the defendant a lot of such goods, in which were woven fabrics of silk, printed by the plaintiff with a design for the ornamenting of them, which had been published by the plaintiff to the defendant and others; and the plaintiff was about to print other fabrics of silk with the same design, and to publish the same in the way of his trade for gain; of all which the defendant had notice; but the defendant, contriving to deceive, injure, and defraud the plaintiff, and induce him to desist from printing more with the design, and to deprive him of the gains he would have made, and to cheat him of the benefit of the design, and to acquire the same for the sole benefit of the defendant, and to put the plaintiff to expense; falsely, fraudulently, and deceitfully represented to the plaintiff that in the lot there was a copy of a registered pattern, (see stats. 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65,) and that, the parties having asked the defendant for the printer, the defendant was obliged to give the plaintiff's

¹ Story v. Norwich, &c. 24 Conn. 94.

² Bank, &c. v. Talcott, 22 Barb. 550.

³ Stewart v. English, 6 Ind. 176.

⁴ Westfall v. Jones, 23 Barb. 9.

name; and the parties intended to proceed against the plaintiff by injunction and order through the Court of Chancery, (thereby meaning that the design was a copy of a design which had been registered, and the copyright in which was subsisting, according to the statutes respecting copyrights of designs, and that the parties interested in the design had asked the defendant who was the printer, and the defendant had been obliged to give the plaintiff's name as printer, and the parties intended to proceed against the plaintiff, to prevent him from pirating the design, by injunction and order through the Court of Chancery); whereas, in truth, no such design, or design resembling it, had been registered according to the statutes aforesaid; and there were no parties interested in the design; nor had any parties asked the defendant for the printer; nor had the defendant given them the plaintiff's name; nor did any parties intend to proceed against the plaintiff by injunction, &c., as the defendant, at the time of making the representation, knew; by means of which representation the plaintiff, believing it to be true, was induced to travel a long distance for the purpose of inquiring into the matters represented, and satisfying the supposed parties, as it was reasonable for him to do under the circumstances; and was induced to abstain from further printing with the design, which he had orders to do, and from selling silk handkerchiefs printed with the design; and the defendant, by means of the premises, enjoyed the benefit of the design to the exclusion of the plaintiff, and printed with the design, and sold, for his profit, silk handkerchiefs, and took the profits, without the competition of the plaintiff, and to his exclusion. On general demurrer, held, that the declaration showed a cause of action; and that the innuendo was unnecessary, and could not therefore be the ground of an objection to the declaration.¹ Upon similar ground, if mortgaged goods are attached conformably to a statute in a suit against the mortgagor, and the mortgagee, in pursuance

¹ *Barley v. Walford*, 9 Ad. & Ell. N. S. 197.

of the statute, demands payment of the attaching creditor, knowing that his claim is wholly false, and thereby induces the creditor to abandon his attachment, and thus lose his debt; he is liable to such creditor for the damages sustained, in an action for the deceit.¹

4. But, in an action for fraud, the plaintiff will be confined to the precise ground of action set forth in his declaration. Thus, in an action on the case against the defendant, for falsely representing that he had funds in his hands, for which he was chargeable as the trustee of a debtor of the plaintiff, whereby the plaintiff was about to sue out a trustee process, from which the defendant was discharged on his answer; the plaintiff cannot prove that the defendant's statement, on oath, in his answer, that he had no funds, was false.² So an action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold; alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained, by evidence of the mere fact, of such purchase by sample in the market, though with knowledge of the plaintiff's claim of toll, coupled with the fact, of not paying the toll on demand, afterwards, when the corn was delivered to the defendant in the same borough, but out of the market; for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market and there sold.³

5. We have already—chap. 1—considered at some length

¹ *Brown v. Castles*, 11 Cush. 348.

² *Merrill v. Gold*, 1 Cush. 457.

³ *Tewkesbury v. Diston*, 6 E. 468.

the wrong of fraud or deceit in the contract of *sale*. (a) It may be here added, that an action on the case may be maintained by the purchaser or lessee of lands against the seller or lessor, for fraudulently misrepresenting the *boundaries* of the lands. And the intent to defraud need not be established by direct proof, but may be made out by circumstantial or presumptive evidence. So, that a vendor of real estate is guilty of fraud, if, knowing that he has no title to a portion of the lands sold, he wilfully suppresses that fact.¹ So also a vendor of land is liable for a false representation as to its location, if the purchaser have not at the time an opportunity of seeing the land. Or for a misrepresentation as to the cost of the land. But not for a mere expression of opinion of its value.² So it has been held, that, even in case of the *gift* of a chattel, which the donor affirms to be his, if the donee is afterwards evicted by the rightful owner, he may maintain an action against the donor.³ And the false representation, in cases of this nature, need not always have been made directly to the plaintiff himself. Thus the defendant, being about to sell a public house, falsely represented to A., who had agreed to purchase it, that the receipts were £180 a month; and A., with the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser instead of A. Held, this action, for fraud, might be maintained.⁴

6. In case of fraudulent *warranty*, the buyer may sell the property for the best price he can obtain, without first offering to return it; and, if he act with common prudence and discretion in disposing of the property, the rule of damages, in an action for deceit brought by him against the seller,

¹ Clark v. Baird, 5 Seld. 183; Whitney v. Allaire, 1 Comst. 305.

² Sandford v. Handy, 23 Wend. 260.

³ Barney v. Dewey, 13 Johns. 224.

⁴ Pilmore v. Hood, 5 Bing. N. R. 97.

(a) Proof of false representations, made as the inducements to a written contract, does not conflict with the rule which excludes evidence varying the terms or conditions of a contract. Sandford v. Handy, 23 Wend. 260.

will be the difference between the price which he obtained, and what the property would have been worth if it had been as warranted.¹ Or, in case of fraud in a sale on the part of the seller, the buyer may rescind the sale, and recover back the consideration paid, in an action for money had and received. But he must restore, or offer to restore, all that he has received under the contract. He cannot rescind in part and affirm as to the residue, even where the sale is of several articles at distinct prices for each.²

7. While a *seller* is liable to an action for fraud in the sale, on the other hand, (see i. 18,) a sale and delivery of goods, procured through a false representation of the *buyer* in regard to his solvency and credit, passes no title as between the parties; and the seller or his representatives may maintain either trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, against him. It is held, that, as the general and absolute ownership remains in the vendor, not only the original interference on the part of the purchaser with the property, but also any subsequent acts of ownership by him, may be treated as an unlawful and tortious taking.³ The purchaser is held to be in all respects liable to be treated as a trespasser; and he cannot avail himself of the conveyance to justify the taking, any more than the detention, of the property.⁴ And a sale of goods procured by the fraud of the vendee is equally void, as between the parties, whether the fraud be indictable or not.⁵ So where a *creditor*, by fraud or deception, obtains the goods of his debtor, the property is not changed, and he cannot apply them to his debt, but the debtor may maintain trover against him.⁶ And where the question is, whether a purchaser of goods procured them through fraud, distinct purchases made by him of others, under similar circumstances, at or about the same

¹ Woodward v. Thacher, 21 Verm. 580.

² Voorhees v. Earl, 2 Hill, 288.

³ Cary v. Hotailing, 1 Hill, 311.

⁴ McKnight v. Morgan, 2 Barb. 171.

⁵ Cary v. Hotailing, 1 Hill, 311.

⁶ Woodworth v. Kissam, 15 Johns. 186.

time, and when the like motive as the one imputed may be reasonably supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*.¹ But where the purchaser, being insolvent, but *not knowing the fact*, represents to the seller that he is able to pay one hundred cents on the dollar and something more, and thereby induces him to sell him goods; the sale is not void for misrepresentation.² Nor where the seller is not induced to enter into the contract by the false representations of the purchaser.³ And where there is an attempt to impeach the good faith of a purchaser, on the ground of fraudulent suppression of information obtained from a letter, he may show the contents of the letter to repel the presumption of fraud.⁴

8. It has been held, that even a purchase of goods, *with a preconceived design not to pay for them*, is such a fraud as will avoid the sale.⁵

9. But it is to be further remarked, that a party who obtains the goods from the fraudulent purchaser, without notice of the fraud, in the usual course of trade,—that is, who gives value for them, makes advances upon them, incurs responsibilities upon the credit of them, or receives them in pledge for money or property loaned upon the strength of them,—may hold the goods against the vendor, being a *bonâ fide* purchaser.⁶ Although it has been questioned, whether contracts of sale procured by fraud are always binding, even as in favor of *bonâ fide* purchasers;⁷ it being laid down as the general rule, that a vendee of goods, who, by reason of fraud in the purchase, has acquired no title against the vendor, can convey none.⁸ And this rule is still so far adopted, that a transfer of the goods by assignment to a *bonâ fide* creditor of the original purchaser, in payment of a preëxisting debt, will not vest the title in such creditor. On the contrary, if the creditor detains the

¹ Cary v. Hotailing, 1 Hill, 317.

² McCracken v. Cholwell, 4 Seld. 133.

³ Bronson v. Wiman, 4 Seld. 182.

⁴ Ibid.

⁵ Ash v. Putnam, 1 Hill, 302.

⁶ Root v. French, 13 Wend. 570;

Mowry v. Walsh, 8 Com. 238.

⁷ Cary v. Hotailing, 1 Hill, 311.

⁸ Ash v. Putnam, Ib. 302.

goods after demand, the vendor may maintain replevin against him.¹ And it is sufficient to impeach the *bona fides* of a purchase of chattels from a fraudulent vendee, that the purchaser had notice of such facts and circumstances, as would naturally excite the suspicion of a man of ordinary prudence and caution, and forbore to make inquiry.² (a)

10. But it is to be further stated, that an action for deceit cannot be maintained, by a party who has himself been wanting in reasonable care; more especially in the absence of any express misrepresentation. Thus, where a note was taken for a horse, in a trade between A. and B., and A. took the note after B.'s conversation had thrown suspicion upon it, and also after his refusal to indorse it; held, in an action by A. for deceit against B., that, as A. had taken the note at his own risk, the rule of *caveat emptor* must apply; and, unless B. appeared to have used some artifice or practice to conceal the defects in the note, he was not liable for deceit.³ And it is to be further remarked, that the rights and claims, either of buyer or seller, against the other party to the contract, on the ground of fraud, may be lost by *waiver* or *acquiescence*. Thus, where a sale of goods is

¹ Root v. French, 13 Wend. 570.

² Smith v. Andrews, 8 Ired. 3.

³ Danforth v. Dart, 4 Duer, 101.

(a) A member of an insolvent partnership at Syracuse, consisting of two persons, purchased goods in Philadelphia on the credit of the firm, under a misrepresentation of its circumstances. The goods were forwarded to Syracuse, but, before they arrived, the partner not privy to the purchase apprised the vendors by letter of the insolvency of the firm, and, among other things, declared the goods subject to their order. The vendors then immediately took steps to reclaim the goods, and actually succeeded as to a part. The residue, however, before the vendors found them, were seized and sold by the sheriff of Schenectady, while lying in a warehouse at that place. In an action by the vendors against the sheriff, held, that the case should have been submitted to the jury on the question, whether there was such fraud in the purchase as avoided the sale; and a new trial was granted, because the Circuit Judge nonsuited the plaintiffs. Ash v. Putnam, 1 Hill, 302.

procured by fraud, the vendor still retains his legal right in them, unless, after discovering the fraud, he assent to the sale, either positively, or by such delay in reclaiming the goods as authorizes the inference of an assent.¹ And his subsequent declarations may be proved, to show an affirmance of the contract, with full knowledge of the facts.² So, if a party has himself received property, in exchange for the property parted with by him, by means of alleged fraud, he must return or offer to return the property received, before he can maintain an action for his own property; unless the other party has by his acts or declarations waived the right to such return. Upon this ground, a party to an exchange of horses, who is deceived by false representations, cannot maintain an action of replevin for his horse, against the party who deceived him, until he has rescinded the contract, and returned, or offered to return, the horse received by him. Thus, on an exchange of horses by A. and B., A. was deceived by B.'s false representations, and sued out a writ to replevy the horse delivered by him to B., and went with an officer to B.'s premises, and there left the horse received of B., without any communication with B. The officer then took the other horse on the writ, and afterwards read the writ to B.; and A. at the same time informed B. that his horse was returned. Held, the action of replevin could not be maintained, it being commenced before the contract was rescinded by the return of B.'s horse. But, on another trial, it further appeared, that, A. and B. having exchanged horses, on a false representation by B. that his horse was kind; on a trial of the horse in the presence of B., the horse was found to be unkind, and B. requested A. to make a further trial, which A. refused to do. B. then promised A. that he would meet him on the next Monday, and "make all right, and settle the affair of the horses." On Monday, B. sent a message to A. that he would not take the horse back. A. thereupon sued out a

¹ *Ash v. Putnam*, 1 Hill, 302.

² *Bronson v. Wiman*, 4 Seld. 182.

writ of replevin against B., without any further communication with him, and took the horse which he had delivered to B. in exchange. Held, the action of replevin might be maintained; as a jury would be warranted in finding, either that A. had offered to return the horse to B., and that an answer had by mutual consent been postponed till Monday, and that B.'s message on that day was a refusal of that offer; or that the message was an express waiver of any further offer to return the horse.¹ And, in regard to *waiver*, it may be further remarked, that where, in case of misrepresentation, by a lessor, for example, as to the territorial limits of the property, the lessee takes possession at the commencement of the term, and after having discovered the fraud, he waives thereby only his right to rescind the contract, but not to recover damages for the fraud.² So, in case of a purchase of personal property, a party does not waive his right to damages, by merely acting in affirmance of the contract after discovery of the fraud.³ (a) More especially a party is not precluded by mere acts of acquiescence from setting up fraud as a *defence*. Thus A. executed a memorandum under seal, in February, stating that he had hired of W. a certain lot in the city of New York, for one year from the first of May next, for \$1000 rent. He was

¹ Thayer v. Turner, 8 Met. 550.

² Allaire v. Whitney, 1 Hill, 484.

³ Whitney v. Allaire, 1 Comst. 305.

(a) A., being deceived by false representations made to him by B., sold goods to B., and took his promissory note for the price. B. sold part of the goods, and received payment therefor. A. rescinded the contract of sale, on the ground of the fraud, and brought an action against B. to recover the money received by him for the goods, and directed the officer to attach B.'s property, but did not specify the property to be attached. The officer attached, on A.'s writ, and on other writs, against B., the residue of the goods sold to him by A., and A. entered and prosecuted his said action. A. afterwards gave notice to the officer that he had rescinded the sale, and, after demanding of the officer the goods attached, brought replevin against him. Held, A. had not affirmed any part of the sale, and might maintain the action. Browning v. Bancroft, 8 Met. 278.

induced to make the contract, through the fraudulent representations of W., that the lot comprehended a certain other parcel of land, which, as it afterwards turned out, belonged to the corporation. A. discovered the fraud before the first of May; and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole, and occupied during the year. Held, in an action by W. for rent, that A. was entitled to a deduction, by reason of the fraud, of at least what he was in good faith obliged to pay for the corporation lease; that A., immediately after discovery of the fraud, might have elected to treat the lease as entirely void; not having done so, however, but having occupied under it during the term, his only remedy was by action or *recoupement* for the damages.¹

11. Another instance of fraud or deceit, for which an action may be maintained, is that of the *false recommendation* of a third person, whereby the plaintiff has been led to trust him, and thereby suffered pecuniary loss. (See i. 9 and n.) In cases of this kind, it is held not necessary to show an intent to defraud any particular individual; but any one defrauded may maintain an action. (a) But on the other hand the defendant may show, that he believed the representations made, and was himself duped by the artifice of the person recommended.² Thus an action on the case for a false affirmation lies, where a certificate known to be false is given to an individual, that he is an honest, industrious, reputable, and otherwise good citizen, of good morals and habits, and that, in the opinion of the defendant, he would honorably endeavor to perform any engagement he should make, in any matter of business or credit; if the per-

¹ *Allaire v. Whitney*, 1 Hill, 484.

² *Williams v. Wood*, 14 Wend. 126.

(a) But a right of action, for a false and fraudulent representation of the solvency of a purchaser, is not *assignable*. Nor would it survive to the personal representatives of the party defrauded. *Zabriskie v. Smith*, 3 Kiern. 322.

son recommended, on the strength of such certificate, obtains goods on credit. And evidence is admissible, that the party was insolvent and worthless when the certificate was given.¹ (a) So a party is liable to an action, who, in bad faith, and with a view of inducing others to credit a merchant, represents that he has examined into his affairs, and considers him solvent and worthy of credit, and that he is going on well, when such merchant is in fact insolvent, and the party making the representations has not investigated his affairs, and knows nothing of his business condition, except that he is largely indebted.² So the responsibility of a party, for false and fraudulent representations, is not necessarily limited to the credit obtained thereby at or immediately subsequent to the time they were made. And where the representations were made in April, and the plaintiffs then, and at various times after, until November, sold the party merchandise on credit; held, it was for the jury to decide, whether the credits given during the summer and fall were induced by the representations.³

12. In an action for falsely and fraudulently representing a person as solvent, the complaint should aver substantially, although not necessarily in direct and technical language, and the plaintiff must prove, that the representations were made with intent to deceive and defraud. But a variance in some particulars between the fraudulent representations alleged and those proved is not material, unless the defendant prove at the trial that he was misled thereby to his prejudice.⁴ And, in an action on the case for fraudulent

¹ Williams v. Wood, 14 Wend. 126.

² Zabriskie v. Smith, 3 Kiern. 322.

³ Zabriskie v. Smith, 3 Kiern. 322.

⁴ Ibid.

(a) Whether or not it was proper for the Judge, in charging the jury, to say that the insolvency and death of the person recommended was sufficient evidence that the debt had not been paid; yet, if he added, that the jury must be satisfied, from all the testimony, that the debt had not been paid, there is no ground for a new trial. Williams v. Wood, 14 Wend. 126.

representation as to the credit of another, though the statute requires the representation to be in writing, it is held that any evidence, parol or otherwise, is admissible to prove the representation false, and it is for the jury to say, upon all the facts, whether the representation was calculated to mislead and did mislead the plaintiffs.¹

¹ *Iasigi v. Brown*, 17 How. 183.

CHAPTER XVIII.

WASTE.

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|--|---------------------------------------|
| 1. Applies only to real property. | 11. Change in the use of land. |
| 2. Definition. | 13. Buildings. |
| 3. Felling of timber. | 17. Remedies ; parties ; forms of ac- |
| 10. Disturbance of the soil ; mines, &c. | tion ; injunction. |

1. **ANOTHER** injury, peculiar both in nature, in the remedy provided for it, and the penalty to which it is subject, is *Waste*. It is an injury exclusively applicable to real property ; somewhat analogous in the nature of the act to *trespass*, but not technically a *trespass*, because committed by a party in possession, (a) and sometimes consisting in mere neglect or omission. The subject, as will be seen, is so extensively and variously regulated by the statutes of the several States, that the plan of the present work admits only a general view of the law relating to it. (b)

2. *Waste* is defined, as " a spoil or destruction in corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail ;"¹ or as the destruction of such things on the land, by a tenant for life or

¹ 2 Greenl. Ev. § 650 ; 2 Bl. Comm. 281.

(a) A statute, giving the reversioner or remainder-man an action of *waste* or *trespass*, notwithstanding any intervening estate for life or years, was held not to authorize the bringing either action at the discretion of the plaintiff, but only to give the one action or the other, in cases, respectively, where it was the appropriate remedy ; that is, *waste* against a tenant, and *trespass* against a stranger. *Livingston v. Haywood*, 11 Johns. 429.

(b) For a full statement of the statutory provisions, see *Hilliard on Real Property*, chap. 18.

for years, as are not included in its temporary profits. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.¹ It is said, "If the tenant for life or for years should by neglect or wantonness occasion any permanent waste to the substance of the estate, whether the waste be voluntary or permissive, as by pulling down houses; suffering them to go to decay from the want of ordinary care; cutting the timber unnecessarily, opening mines, or changing one species of land into another; he becomes liable, in a suit by the person entitled to the immediate estate of inheritance, to answer in damages, as well as to have his future operations stayed."²

3. A prominent species of waste is *the felling of timber*. It is said, that it is scarcely possible to estimate the injury, which the destruction of a few valuable timber trees, by a tenant for life, on a farm with a scanty stock of wood and timber, may occasion to the owner of the inheritance. Hence bills to restrain waste of this character are not to be frowned upon by the Court.³

4. In case of *lease*, creating the technical relation of landlord and tenant, express provision is not ordinarily made with reference to the timber; and it is to this class of cases that the general doctrines of waste are applicable. If, however, as is sometimes done, the timber is expressly included in a lease, the lessee may have an action of trespass against the lessor for felling the trees, and the lessor an action of waste against the lessee. And against a stranger each may have his own appropriate action. If the trees are expressly excepted, the lessor may fell them, or sue the lessee for doing it, or maintain trespass against a stranger.⁴ And it is to be further remarked, that, if a lease for life contains the clause, well known to the ancient law, "*absque impetitione vasti*"—*without impeachment of waste*; such clause both authorizes

¹ 1 Swift, 517, 518; 1 Hill. R. Pr. 260, 261.

² 4 Kent. 75.

³ *Sarles v. Sarles*, 3 Sandf. 601.

⁴ 11 Rep. 48 a; *Pomfret v. Riccroft*, 1 Saun. 322, n. 5.

the tenant to cut timber, without incurring the statutory penalty, and vests the property of it in him, when cut or blown down. But if the timber is cut by a stranger, it belongs to the reversioner.¹ But such clause does not justify *malicious* waste, destructive of the estate; such as tearing off fixtures, or cutting timber which serves for shelter or ornament of a mansion. Such injuries are sometimes termed *equitable waste*.² (a)

5. In the absence of any express agreement or provision on the subject, a tenant has no right to cut down timber trees, especially if it is bad husbandry to do so, and there is no pretence of its being done for *estoners*. But he may cut *coppices* and underwoods, according to custom and at seasonable times. . So the *thinings* of fir trees less than twenty years old belong to a tenant for life.³ *Timber* trees are those used for building, and the question is one of *local usage*. But it is also waste to cut those standing in defence of a house, though not timber; or to cut trees for fuel, where there is sufficient dead wood; or to *lop* timber trees, and thereby cause them to decay; or to cut down fruit trees in an orchard or garden.⁴

6. With reference more particularly to the felling of timber, and in consideration of the important distinction, that in England "every part of every tree will bring cash," while

¹ 4 Kent, 77; Co. Lit. 220 a; Lewis ling, 2 Coll. 275; Edge v. Pemberton, Bowles' case, 1 Rep. 82 b. See Bringloe v. Goodson, 8 Scott, 71. 12 M. & W. 11.

² Vane v. Barnard, 2 Vern. 738; Chandel v. Talbot, 2 P. Wms. 606; Downshire v. Sandys, 6 Ves. 108. Rex v. Minchin, 3 Burr. 1308; Jackson v. Brownson, 7 Johns. 234; Dyer, 65 a; Co. Lit. 53 a.

³ Co. Lit. 53 a; Ridgeley v. Raw-

(a) Although only an *immediate* reversioner in fee can sue for waste, yet the property in timber cut by a tenant rests in the remote reversioner. Mores v. Wait, 3 Wend. 104; Bewick v. Whitfield, 3 P. Wms. 267; Uvedale v. Uvedale, 2 Rolfe, Abr. 119.

So where the timber is severed by a storm. Newcastle v. Vane, 2 P. Wms. 241.

It is said, *windfalls* belong to the landlord. Bouv. L. D., *Waste*.

in this country lands are in a great measure valueless until cleared,¹ the rules of the English law of waste have been much modified in the United States. It is said, in New York, the doctrine of waste, as understood in England, is not applicable to a new and unsettled country. Hence, where the whole of a farm, when leased for a rent, is in a wild and uncultivated state, with the exception of a few acres, the parties will be held to have intended, that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation. But not to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value. And to what extent wood may lawfully be cut, must be left to the sound discretion of the jury, under the direction of the Court. But where a tenant cuts trees, not for the purpose of preparing the land for cultivation, but for the profit to be derived from a sale, he is guilty of waste. So, although a tenant for years may, from the commencement of his term, gradually clear up the woodland and prepare it for cultivation; yet he will not be permitted, just before the expiration of his lease, to cut down timber, upon that pretext. And relief is granted, in such case, upon the same principles on which an injunction is granted to stay what is called *equitable waste*.² In the same State, it is held that chancery will not restrain a *purchaser* from cutting timber upon the land; unless he does so to such an extent, as to render the land an inadequate security for the unpaid purchase-money.³ So, in North Carolina, a widow, to whom were assigned in dower 240 acres of land, only thirty of which were cleared, may cut down the timber on sixteen acres more, intending to clear it for the support of her family.⁴ But, though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner of the fee would do, and sell the timber that grew on that part of the land; yet it is waste to cut down

¹ *Givens v. M'Calmont*, 4 Watts, 463.

² *Kidd v. Dennison*, 6 Barb. 9.

³ *Van Wyck v. Alliger*, 6 Barb. 507.

⁴ *Lambeth v. Warner*, 2 Jones, Eq.

165.

valuable trees for sale.¹ So, in Massachusetts, it has been held not to be waste to cut oaks for fuel, on account of their abundance, and the custom of using them for this purpose.² So in New Hampshire, if a tenant for life of a farm have other outlying woodland, he may take all his necessary fuel from the farm, though, when he formerly owned the farm in fee-simple, he was in the habit of taking part of his fuel from the outlying woodland. And, if the owner of a farm sell it in fee, and take back a conveyance for his life, his former practice in the manner of taking wood for fuel is not competent evidence, on the question whether he has committed waste in cutting wood and timber.³ So, in Ohio, timber cut to improve land belongs to the tenant for life, and not to the reversioner.⁴

7. With regard to the amount of damages for the cutting of timber, it is held, that, in an account decreed against a tenant for waste of timber, he may be allowed, in mitigation, for firewood and timber furnished by him for the farm, from other premises.⁵

8. Where, in an action on the case in the nature of waste, it was found that the land in question was damaged by cutting and carrying away forest trees, which were of the value of \$253.50; it was held, that this constituted a sufficient injury to sustain such action, but that the plaintiffs should recover only to the extent of the damage to their specific estate.⁶

9. Although cutting and selling wood off the farm is waste, the reversioner cannot claim a forfeiture on this account, if he has assented to it either before or after the cutting.⁷

10. It is waste to dig for clay, gravel, lime, stone, &c., except for repairs or manurance. So also to open a new mine (unless in case of a lease of all mines in the land) or

¹ *Davis v. Gilliam*, 5 Ired. Eq. 308.

² *Padelford v. Padelford*, 7 Pick. 152.

³ *Webster v. Webster*, 33 N. H. 18.

⁴ *Crockett v. Crockett*, 2 Ohio, (N. S.)

⁵ *Sarles v. Sarles*, 3 Sandf. 601.

⁶ *Hamden v. Rice*, 24 Conn. 350.

⁷ *Clemence v. Steere*, 1 R. I. 272.

claypit; but not to work one already opened, or to open new pits or shafts for working the old veins; because they could not otherwise be wrought. If mines are expressly included in the lease, and there are open ones, those only are embraced. But if there are no open ones, those unopened will pass.¹

11. Anciently, the *conversion of one kind of land into another* was waste, because it changed the course of husbandry, and tended to obscure the title. And there was held to be an implied covenant by a lessee, to use a farm in a husbandlike manner, and not to exhaust the soil by neglectful or improper tillage.² But the old rule, in the improved state of modern agriculture, may be considered as greatly relaxed, if not wholly obsolete; unless the change in question is contrary to the ordinary course of good husbandry, or is inconsistent with common prudence or impoverishes the land. And the tenant will not be liable for an injurious change, arising from any operation upon the land, which could not reasonably have been foreseen, especially if the reversioner has long delayed to make any claim therefor, and in the mean time the land has been restored to a state as good as the former one.³

12. The removal of coarse bog-grass from a farm, which had usually been foddered on the farm, was held to be waste. So the impoverishment of fields, by constant tilling from year to year.⁴ Or suffering pastures to be overgrown with brush, where it would not be suffered by a man of ordinary prudence. But not converting meadow-land into pasture-land; unless detrimental to the inheritance, or contrary to the ordinary course of good husbandry.⁵ Nor meadow or pasture into plough land, or woodland into a farm.⁶ Nor for a tenant for life of a farm, to sell hay, to be re-

¹ 1 Hill. R. Pr. 265.

² 5 T. R. 373.

³ 1 Swift, 517, 518; Keepers, &c. v. Alderton, 2 B. & P. 86; Prynchou v. Stearns, 11 Met. 304; Gunning v. Gun-

ning, 2 Show. 8; Jackson v. Andrew, 18 Johns. 431; Co. Lit. 53 b.

⁴ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁵ Clemence v. Steere, 1 R. L. 272.

⁶ Crockett v. Crockett, 2 Ohio, (N. S.) 180.

moved from the farm, conformably to the custom in the vicinity.¹

13. In relation to *buildings*, waste may be committed, either by pulling them down, or suffering them to remain uncovered, whereby the timbers rot.² (a) And, as in case of land, waste may be committed by an unauthorized *change* in a building.³ Thus it is waste to convert a dwelling into a store or warehouse, or a parlor into a stable. Or to convert two chambers into one, or one into two; or a hand-mill into a horse-mill.³ Or to pull down a house, though a new one be built, if smaller than the former.⁴ Or even to build a house where there was none before.⁵ Or take it down after it is built.⁶ But not to erect a new out-house, with timber from the farm, in place of one which had become ruinous.⁷ And a covenant by the lessor, that the lessee may "repair, alter, and improve," will prevent alterations in a building from constituting waste, which might otherwise be so construed.⁸ And, for an unauthorized removal of fixtures, put in by a lessee under a special agreement in writing as to his right to remove, and the lessor's right to purchase them; the lessor's remedy is by action on the agreement, and not on the covenant against waste in the lease.⁹ But the question of *injury* arising from the alteration of a building is to be left to the jury. Thus an action on the case was brought by the owner of a house, against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea, not guilty. The jury found, that the lessee did open the door without leave,

¹ *Sarles v. Sarles*, 3 Sandf. Ch. 601.

² Co. Lit. 53 a and n. 3.

³ *Douglass v. Wiggins*, 1 Johns. Ch. 435; Co. Lit. 53 a, n. 3; 2 Rolle, Abr. 814, 815.

⁴ Bro. Abr. *Waste*, 93; Co. Lit. 53 a, and n. 4.

⁵ Co. Lit. 53 a.

⁶ Com. Dig. *Waste* D. 2.

⁷ *Sarles v. Sarles*, 3 Sandf. Ch. 601.

⁸ *Hasty v. Wheeler*, 3 Fairf. 436, 437.

⁹ *Wall v. Hinds*, 4 Gray, 256.

(a) To remove *fixtures* unlawfully is waste. (See chap. 9.)

but that the house was not in any respect weakened or injured by it. The Judge thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case. Held, that the plaintiff was not, at all events, entitled to a verdict; but, as his reversionary interest might be injured, although the house itself was not, and that question had not been submitted to the jury, the Court ordered a new trial.¹

14. As has been already remarked, waste may be either *voluntary* or *permissive*. And permissive waste consists chiefly in suffering buildings to decay. But if they were ruinous when leased, the tenant is not bound to repair, though justified in cutting timber for that purpose.² Or even in cutting timber trees, and selling them to procure boards for repairs, if this course be economical and beneficial to the estate.³ And it is not waste merely to violate a covenant to repair.⁴

15. A tenant is not generally liable for waste caused by act of God or enemies; as where a house falls by reason of a tempest. But, if merely unroofed, he is bound to re-cover it before the timbers rot.⁵ And, where a lessee for years covenanted, that the buildings which he should erect should, at the expiration of the term, revert to the lessor "without damages of any kind except the natural wear of the same," and a building so erected was destroyed by means of the negligent acts of a third party; held, it was a waste, for which the tenant was responsible to the lessor, and that the lessee or his assignee, in an action against the party guilty of the negligence, was entitled to recover the whole value of such building.⁶

16. It is held that a court of equity will not interfere, to make a tenant for life liable in respect of permissive waste.⁷

¹ Young v. Spencer, 10 B. & C. 145.

² Co. Lit. 53 a, 54 b.

³ Loomis v. Wilbur, 5 Mas. 13.

⁴ Co. Lit. 54 b, n. 1.

⁵ 1 Hill R. Pr. 266.

⁶ Cook v. The Champlain, &c. 1 Denio, 91.

⁷ Powys v. Blagrove, 27 Eng. L. & Eq. 568.

And that an action on the case for permissive waste in buildings does not lie against a tenant by lease, who has not covenanted to repair.¹

17. It will be seen, that the law provides various remedies for the injury of waste. With reference to the parties to such remedies, the *action of waste*, which is the ancient process, lies against a tenant for life or for years, in favor of him only who has the next immediate estate of inheritance, in reversion or remainder.² But a person having an expectant interest in land, less than the inheritance, cannot maintain an action for waste.³ Nor can one having a contingent remainder, or entitled upon a contingency to an executory devise, as having the next immediate estate of inheritance, maintain an action of waste.⁴

18. Where the husband has possession of the wife's land, after issue born, case in the nature of waste is the proper remedy for an injury to the inheritance, by cutting timber trees, and should be in the name of the husband and wife jointly. For an injury to the crop, he must sue alone.⁵

19. By virtue of two early English statutes, any tenants for life or for years are made liable for waste. Statute of Marlbridge, 52 Hen. III. ch. 24, authorized the action of waste and gave full damages; and the statute of Gloucester, 6 Edw. I. ch. 5, extended the penalty to a forfeiture of the place wasted, and treble damages.⁶ (a) But by a late statute, 3 & 4 Wm. IV. ch. 27, the writ of waste is abolished. And with regard to the parties who may maintain an action, or be held liable, for waste, the statutes of the different States have made very diverse provisions, greatly modifying the English law.⁷

20. *Tenancy for life*, to which, as well as tenancy for years, the law of waste applies, is more frequently created by *act of law* than by *act of parties*. But it has been held, that an

¹ *Herne v. Bembow*, 4 Taunt. 764.

² 2 Greenl. Ev. § 652.

³ *Peterson v. Clark*, 15 Johns. 205.

⁴ *Hunt v. Hall*, 37 Maine, 333.

⁵ *Williams v. Lannier*, Busb. Law, 30.

⁶ 3 Bl. Comm. 14.

⁷ See 1 Hill. R. Pr. 269, 270.

act, restricting tenants for life from committing waste, embraces tenancies for life created by will.¹

21. A tenant in *dower* is ordinarily liable for the commission of waste. (a) But after a tenant in dower has *assigned* her estate, she is not liable to the assignee of the reversion for waste committed by her assignee, either in an action of waste, or in an action on the case in the nature of waste.²

22. In general, a tenant *by the curtesy* is liable for waste.³ So *husband and wife* may be jointly liable.⁴ Thus the husband of a tenant in dower, who removes a house from the premises, is liable in an action in the nature of waste, even after the death of his wife, though he may have built the house himself. But the husband of a tenant in dower is not liable for permissive waste, after the death of his wife, and the surrender of his possession.⁵

¹ Hamden v. Rice, 24 Conn. 350.

⁴ Bacon v. Smith, 1 Ad. & Ell. N. S.

² Foot v. Dickinson, 2 Met. 611.

345; Dejarnette v. Allen, 5 Gratt. 499.

³ Morgan v. Larned, 10 Met. 50;

⁵ Dozier v. Gregory, 1 Jones, Law, 100.

Davis v. Gilliam, 5 Ired. Eq. 308.

(a) In Georgia, the remedy is by an action on the case in the nature of waste, for actual damages, or by injunction. The statute of Gloucester, by which the tenant in dower, in case of waste, forfeited her estate, and was liable for treble damages, has not been adopted. Parker v. Chambliss, 12 Geo. 235.

The language of the statutes referred to is as follows:—

The former provides—"Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciamment grievously."

The latter—"A man shall have a writ of waste in the chancery against him that holdeth by law of England or otherwise, for term of life or for term of years, or a woman in dower; and he which shall be attainted of waste shall lease the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at."

It has been a matter of very serious discussion, whether the latter statute applies to permissive waste. 1 Chit. Gen. Prac. 386; 1 Saun. 323 b, n. 7 and n. k.; 2 Ib. 259, n. 11 and n. b.

23. A husband, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They began cutting during her life, and continued cutting after her death. On a bill filed by her infant heir, the cutting was enjoined; and it was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question of the husband's accounting for it; and also whether the interests of the infant required that the trees still standing should be felled.¹

24. Although liability for waste is usually connected with *tenancy*, it is held that a tenant is responsible for waste, by whomsoever done. The reversioner looks to the tenant, and he has a claim over, in trespass, against the wrongdoer. The tenant, in this respect, is compared to a *common carrier*.² But in equity a tenant may be joined as defendant with the party by whom the waste was actually committed. And, in a suit for waste against a tenant for life and her under-tenant, on a decree for an account against both, the master may be ordered to ascertain what portion of the sum reported against the former shall be paid by the latter.³

25. *Ecclesiastical persons*,—bishops, parsons, &c.,—seized of lands *jure ecclesiæ*, though having a fee simple qualified, are placed, in respect to waste, under the restrictions of tenants for life.⁴ But they may cut timber or dig stone for repairs of the church or parsonage.⁵ (See p. 306.)

26. An action on the case, in the nature of waste, lies against *the assignee* of a lessee.⁶ But an action of waste does not lie by the heir against the assignee of tenant by the curtesy, but only against the tenant himself.⁷ So an action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted, from time to time, and at all times during the term when need should require, sufficiently to repair the

¹ Ware v. Ware, 2 Halst. Ch. 117.

² 4 Kent, 77; 1 Cruise, 124; White v. Wagner, 4 Har. & J. 373.

³ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁴ Rich. Lifford's case, 11 Rep. 49 a.

⁵ Ibid.; Marlborough v. St. John, 15 Eng. L. & Eq. 146.

⁶ Short v. Wilson, 13 Johns. 33.

⁷ Bates v. Shraeder, Ib. 260.

premises, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of J. M. ; upon a breach, that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up, in much worse order and condition than when the same were finished under the direction of J. M.¹

27. A *guardian* has in some cases been held liable for waste. But where a testator appoints a trustee of all his estate, during the infancy of his heir, such trustee is neither a guardian, so as to be liable for waste at common law, nor a tenant for life, or years, or other term, so as to be within the statutes against waste.²

28. It has been held that one *tenant in common* may be liable to another for waste. The subject, however, is often regulated by statute. And it is held, that the action on the case in the nature of waste, allowed by the Revised Statutes of North Carolina, to one tenant in common against his cotenant, is confined to cases where there is a permanent injury done to the property held in common.³

29. A perpetual *curate* is liable to an action on the case, at the suit of his successor, for dilapidations.⁴ But case, as for dilapidations, does not lie against the executors of a prior incumbent for mis-cultivation of the glebe.⁵ (See p. 305).

30. As has been suggested, the law of waste has been greatly modified in the United States, as well with reference to *remedies*, as to the injury itself. Thus it is said⁶ that, although the provisions of the statute of Gloucester may be considered as imported by our ancestors, with the whole body of the common and statute law then existing, and applicable to our local circumstances; yet the action of *estrepement*, or waste, is in great degree superseded by an action on the case in the nature of waste, which lies in

¹ Jones v. Hill, 7 Taunt. 392.

² Kincaird v. Scott, 12 Johns. 368.

³ Smith v. Sharpe, Busb. Law, 91.

⁴ Mason v. Lambert, 12 Ad. & Ell. N. S. 795.

⁵ Bird v. Relfe, 1 Nev. & Man. 415.

⁶ 4 Kent, 80, 81.

favor of any other reversioner, as well as the owner in fee.¹ And in New York it is held, that, if a lessee cut trees which it is his duty, either by law or by his contract with the lessor, to preserve, he is liable to an action of waste, or case in the nature of waste; or, in the case of a contract, to an action on the contract. He is also liable in trover, for the wood which has been severed from the freehold. Or in trespass, for carrying away and converting the wood, after the trees had been cut. Therefore, where a lessee for years, by a clause in the lease not amounting to an exception, agreed to leave and not to cut certain trees, which, however, he did cut and carry away during the term; held, though trespass *qu. claus.* could not be brought for the cutting of the trees, because the plaintiff was not in possession, yet the landlord might maintain trespass *de bonis asportatis* against the tenant, for carrying away the wood after it had been severed from the freehold.²

31. Case, in the nature of waste, will lie against a tenant for years after the expiration of his term, as well as covenant for the breach of covenants contained in his lease.³ (See i. 29.) But an action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair.⁴

32. If a *tenant at will* commits waste, it is a determination of the will, and trespass *qu. claus.* may be maintained against him by the reversioner.⁵

33. Although, as has been stated, waste is a wrong, which, even according to the terms of its legal definition, is committed by a *tenant* against the *landlord, reversioner, or owner of the inheritance*; yet a similar wrong, subject to like remedies, may sometimes be committed by and against other parties. Thus, somewhat upon this principle, where a purchaser of mills, being in possession, negligently suffers them

¹ 4 Kent, 81. See 1 Hill. R. Pr. 268, 269.

² Schermerhorn v. Buell, 4 Denio, 422.

³ Kinlyside v. Thornton, 2 W. Black. 1111.

⁴ Jones v. Hill, 1 Moore, 100.

⁵ Daniels v. Pond, 21 Pick. 367.

to be burned, he is responsible to his vendor for the loss, upon a rescission of the contract, deducting the amount paid by him.¹ So an injunction was allowed, restraining waste on a farm conveyed by the complainant to the defendant, on a bill, alleging that a deed for the farm was procured by the defendant from the complainant by undue means, the complainant being addicted to intemperance; and praying that the deed may be declared void. And, after answer, the motion was retained to the hearing.²

34. So the injury of waste may be committed by a party in the *adverse possession* of land, more especially where a suit has been brought by the alleged true owner to eject him. And in some of the States express statutory provision has been made in reference to this kind of waste. Though it is held, that a person in possession of land under such circumstances should, until he is legally evicted, be permitted to remain in the full enjoyment thereof, to the extent that he would be, were no adverse claim set up; subject to the restriction, that he shall not commit a permanent and lasting injury to the inheritance.³ So in New York, the purchaser of land *sold on execution*, after receiving the sheriff's deed, may bring waste, or an action on the case in the nature of waste, against the defendant in the execution, for cutting timber while he remained in possession, during the fifteen months subsequent to the sale. He may also bring trover for the timber. But not replevin in the *cepit*, which lies only where trespass might be brought; and trespass for an injury to real estate can only be sustained by a party in possession.⁴ But a creditor, to whom the life interest of his debtor in land has been set off on execution, cannot, in an action of trespass against such debtor, for entering and cutting trees on the land, recover damages for trees belonging to the inheritance, the cutting of which by the creditor would be waste.⁵

¹ Cornish v. Stratton, 8 B. Mon. 586.

² Staats v. Freeman, 2 Halst. Ch. 490.

³ People v. Davison, 4 Barb. 109.

⁴ Rich v. Baker, 3 Denio, 79.

⁵ McKen v. Gammon, 33 Maine, 187.

35. Waste is a prominent subject of chancery jurisdiction. It is said, chancery will interpose where a trespasser, in collusion with the tenant, attempts to cut timber; or where boundaries are in dispute, and one party is about to cut ornamental or timber trees; or where one in possession under a contract is proceeding to cut timber. So where a mere trespasser digs into a mine and works it. Or where lessees are taking from a manor, bordering on the sea, stones of peculiar value.¹

36. Although, as has been seen, only the immediate reversioner in fee can maintain the action of waste, chancery will interpose to prevent waste, upon application of the owner in fee, notwithstanding an intermediate reversion. Or, in favor of the landlord, against a sub-tenant.²

37. In case of *privity of title*, an injunction will be granted without showing *irreparable injury*.³ Though it is otherwise as between parties *claiming adversely*.⁴ And a landlord need not prove his title.⁵ (a) So there may be a decree

¹ 2 Story, Eq. 244, 245, § 929.

² 1 Hill. R. Pr. 271, 272.

³ George's, &c. v. Detwold, 1 Md.

Ch. 371; Hamilton v. Ely, 4 Gill, 34.

But see Lyon v. Hunt, 11 Ala. 295.

⁴ Ibid.

⁵ Parker v. Raymond, 14 Mis. 535.

(a) In a bill for waste, proof of a single clear instance of waste, committed intentionally, is sufficient to entitle the plaintiff to a continuance of the injunction and to a decree for an account. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

An account may be ordered, of waste committed by a tenant for life, and her under-tenant, in respect of timber, dilapidations, undue tillage, and withdrawing manure. *Ibid*.

Equity will interfere to prevent injury to land, even where the title is in dispute, and the right doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. *Spear v. Cutter*, 5 Barb. 486.

But not to prevent the removal of timber wrongfully cut, or for an account for waste already committed; as the plaintiff has an ample remedy at law for such injury. *Ibid*.

But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already com-

of account for past waste.¹ Or to remove a cloud on the title.²

38. It has been held, that an injunction will not be granted, upon the allegation that the defendant is selling timber of the complainant, without an allegation of peculiar value for some special purpose.³ But the mere expression of a right and intention to commit waste, without any act, will be sufficient ground for an injunction, if occurring *pendente lite*.⁴

¹ *Rodgers v. Rodgers*, 11 Barb. 595. 8 Wend. 611; *Anwyl v. Owens*, 19

² *Lyon v. Hunt*, 11 Ala. 295. Eng. L. & Eq. 610; *Green v. Keen*,

³ *Hatcher v. Hampton*, 7 Geo. 49. 4 Md. 98; *The White, &c. v. Comegys*,

⁴ 1 Hill. R. Pr. 272, 273. See *Haynes*, 2 Cart. 469.

mitted, the Court, to avoid a multiplicity of suits, will allow an account and satisfaction for what has been done; and, where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber he has cut. *Ibid*.

CHAPTER XIX.

INJURIES TO RELATIVE RIGHTS. PUBLIC RELATIONS. OFFICERS
OF THE LAW. JUDICIAL OFFICERS.

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| 1. Injuries to <i>relative rights</i> ; by and against officers of the law; judicial officers. | Peace; <i>judicial</i> and <i>ministerial</i> duties and acts. |
| 4. Magistrates and Justices of the | 11. Want of jurisdiction. |
| | 12. Malice, &c. |

1. HAVING considered torts to *absolute* rights of person, reputation, and property, we proceed to a view of those committed by or against parties, as *related* to others in some public or private capacity. This class of wrongs has been often incidentally referred to in the foregoing pages, but it now requires a distinct and detailed consideration.

2. Among wrongs of a *public* nature, (using the word *public* in the sense above explained,) are chiefly those committed by or against *officers of the law*, assuming to act under color and protection of their office.

3. A general and comprehensive division of officers of the law is that of *judicial* and *ministerial* officers. Judicial officers are defined, as those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with a violation of the law. And ministerial officers, as those whose duty it is to execute the mandates, lawfully issued, of their superiors.¹ With regard to the former, it is said by an ancient authority, that the law has so much respect for the certainty of judgments and authority of judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking

¹ 2 Bouv. L. D. 260.

either of the law or of the case and matter in fact.¹ And it is further said to be a general rule of very great antiquity, that "no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions. In the imperfection of human nature, it is better that an individual should occasionally suffer a wrong, than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct; for these I trust there is, and always will be, some due course of punishment by public prosecution."² (a) And the following extended remarks of the learned Chief Justice of Massachusetts may well be cited, as giving a recent and comprehensive view of the whole subject: "It is a principle lying at the foundation of all well ordered jurisprudence, that every judge, whether of a higher or a lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiassed convictions, uninfluenced by any apprehension of consequences. It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to decide right, in matter either of law or fact; but to decide according to his own convictions of right, of which his recorded judgment is the

¹ Bac. Max. 17. See *Taaffe v. Downes*, 3 Moo. P. C. C. 36, n.; ² *Garnett v. Ferrand*, 6 B. & C. 611; 1 Cowp. 172. *Ryalls v. Reg.* 11 Q. B. 796.

(a) The same protection or privilege is thus still more extensively described: "An action cannot be supported against a judge, nor a justice of the peace, acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive, nor against a jurymen, nor the attorney-general, nor a superior naval or military officer, for any act within the scope of his authority." 1 Chit. Pl. 68.

test, and must be taken to be conclusive evidence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. This trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to a different conclusion. But in a controverted case, however slight may be the preponderance in one scale, it must lead to a decision as conclusive as if the weight were all in that scale.—Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another. And this may extend to every interest which men hold most dear; to property, reputation, and liberty, civil and social; to political and religious privileges; to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. If it be said, that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction,—the conclusion of his own mind, in the decision of the original case,—as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations.—The general principle, which excepts judges from answering in a private action, as for a tort, for any judgment, given in the due course of the administration of justice, seems to be too well

settled to require discussion ; and, as was said by Mr. Chief Justice Kent, in the case of *Yates v. Lansing*, 'has a deep root in the common law.' I shall, therefore, only refer to the case just mentioned, as reported in 5 Johns. 282, and 9 Johns. 395, where the authorities are fully stated and reviewed. Although there was some difference of opinion in that case, it was upon the point, whether or not the order passed by the chancellor, which was the subject of complaint, was a judicial act, done within his jurisdiction ; not, whether, if it were within his jurisdiction, he could be called upon to answer for it elsewhere in a civil action. And we think, therefore, that those who dissented in this case concurred with the opinion of the Court, and with all the authorities, that where the subject-matter and the person are within the jurisdiction of the court, the judge, whether of a superior or inferior court, is justified.—These rules extend as well to a justice of the peace as to any other judicial officer, acting within his jurisdiction, in a judicial capacity."¹ Upon these grounds, it is held in an old authority, if a judge makes a mistake in anything within his jurisdiction, an action will not lie against him or his officer. Though it is otherwise, if he award process which he has no jurisdiction to award.² Thus commissioners of bankrupts are not liable to an action of trespass, for committing a person who does not answer to their satisfaction, when examined before them, touching the estate and effects of a bankrupt ; the act being within their authority, though it may be done through an erroneous or mistaken judgment.³ (a) So if an action be brought against

¹ Per Shaw, C. J., *Pratt v. Gardner*,
² Cosh. 68-70.

² *Smith v. Boucher*, Rep. t. Hardwicke, 66.

³ *Doswell v. Impey*, 1 B. & C. 163.

(a) But where a warrant of commitment by the Court of Review, made in the matter of E., a bankrupt, after reciting that, by an order of the same court therein, on the petition of E., it was ordered that W. G. should stand committed to the Fleet, for his contempt in the said petition mentioned, and that a warrant should issue for that purpose ; required the warden of the

a judge of a court in a foreign country, if under the dominion of the crown, for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a sufficient justification.¹ So, where the State constitution confers the right to vote upon "white male citizens" only, and a person offering to vote is challenged on the ground of his color, the inspectors, in determining the question of qualification, act judicially and not ministerially; and therefore they are not liable in an action on the case for damages, for improperly refusing a vote, because the person offering it was partly of African descent.² So an action upon the case was held not to lie against *the vicar-general of the bishop*, for excommunicating the plaintiff with *the greater excommunication*, for contumacy, in not taking upon him administration of an intestate's effects, to whom the plaintiff was next of kin, and intermeddling with the goods, &c.; although the citation, by which the plaintiff was cited, was void, by reason that it required him to appear and take administration, &c., without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, viz., the granting administration, and there was no malice.³ So *the steward of a court baron* is a judicial officer, and trespass will not lie against him, where his bailiff by mistake took the goods of B., under a precept commanding him to take in execution the goods of A.⁴ So trespass

¹ *Mostyn v. Fabrigas*, 1 Cowp. 172.

² *Gordon v. Farrar*, 2 Doug. 411.

³ *Ackerley v. Parkinson*, 3 M. & S.

411.

⁴ *Holroyd v. Breare*, 2 B. & Ald. 473.

Fleet to take W. G. and convey him to the Fleet, there to remain until the further order of the Court; and the previous order stated a petition to have been preferred by E., that W. G. might stand committed "for his contempt of the order in the said petition mentioned," but specified nothing further as to the contempt; held, that the warrant and order were bad, as not containing any proper adjudication of a contempt, nor showing how the party committed might clear himself. *Green v. Matthew*, 5 Ad. & Ell. N. S. 99.

does not lie against magistrates, acting upon a complaint made to them on oath, by the terms of which they have jurisdiction, though the facts might not have supported such complaint; more especially if such facts were not laid before them at the time, by the party complained against, having notice of such complaint, and being properly summoned to attend.¹ Thus if a person be charged on oath before a magistrate with felony, and he issues his warrant, and the charge is substantiated, and the offender committed to prison; the magistrate is not liable for false imprisonment, although the charge turns out to be unfounded.² So an action will not lie against a justice of the peace, for issuing a writ in favor of a third person upon a false claim against the plaintiff, and secreting and destroying the writ after service thereof, and refusing to enter it, or to allow the defendant his costs. It might be otherwise, if the defendant had known, when the action was commenced, that the claim was false and unjust, or if there had been a conspiracy between the parties to injure the plaintiff, in pursuance of which the writ was sued out and issued. But the act of the defendant was a judicial act, for which an action could not be maintained. The remedy of the plaintiff was a judgment for costs against the plaintiff in the former suit; which, being provided by statute, must be held exclusive and complete.³

4. As has been seen, the general principle above laid down in relation to judicial officers has been often applied to the class familiarly known as *magistrates* or *justices of the peace*. (a) Thus an action for false imprisonment will not

¹ *Lowther v. Radnor*, 8 E. 113.

² *Raymond v. Bolles*, 11 Cush. 315,

³ *Mills v. Collett*, 3 Moo. & P. 242.

317.

(a) In regard to this class of officers, whose duties in the United States are of the highest importance; it has been held, that nothing can be presumed in favor of the jurisdiction of a justice of the peace. *The State v. Hartwell*, 35 Maine, 129.

lie against a magistrate for imprisonment, in consequence of judicial acts done by him.¹ The rule, however, has been sometimes laid down in the qualified form, that trespass does not lie against a magistrate for anything done in the discharge of his duty, unless he is made acquainted with all the circumstances, necessary to enable him to determine, when called on to act. Where, therefore, the treasurer of a benefit society brought such action against a magistrate, for issuing a warrant of distress against him, upon a previous order of two magistrates for the relief of a member, in pursuance of the statute 33 Geo. III. c. 54, § 15; it was held, that the action could not be maintained; it appearing, on the face of the order, that the treasurer made no defence, the defendant's jurisdiction not having been questioned at the time, and the treasurer having neglected to present to his notice a rule of the society, which directed all disputes between its members to be referred to arbitration; and which rule was confirmed

¹ Bushell's case, 1 Mod. 119; Hamond v. Howel, Ib. 184.

And that the jurisdiction of magistrates can arise only from the express provision of statute, and not from the agreement of parties. Call v. Mitchell, 39 Maine, 465.

And can never be inferred from the mere fact that a statute, by its phraseology, *implies* that their jurisdiction extends to a particular case. Her-som's case, 39 Maine, 476.

But, on the other hand, in proceedings in cases arising before justices of the peace, much liberality is allowed in construing the acts of the parties, as well as of the justices themselves. Mooney v. Williams, 15 Mis. 442.

And it is also held, that the same rule of construction is extended in favor of the jurisdiction of justices of the peace, as of courts of general jurisdiction. Wright v. Hazen, 24 Verm. 143.

Although a justice of the peace may have removed from the county, yet, if he continues to exercise his functions, he is a justice *de facto*, and his acts will be binding on third persons, unless he removed with the absolute intent to change his place of residence. Lexington, &c. v. McMurtry, 6 B. Mon. 214.

And the same rule applies, where a justice of the peace has accepted another office incompatible with that of a justice of the peace. Commonwealth v. Kirby, 2 Cush. 577.

by section 16 of the statute, whereby the award was made conclusive, without being subject to the control of the magistrates.¹ So an action does not lie, certainly without proof of malice, against a justice, for refusing to take bail on a charge of misdemeanor; his duty in this respect being not merely ministerial.² Nor against a justice of the peace, for an error of judgment, in taking a recognizance to prosecute an appeal in a form not authorized by law, and therefore invalid.³ Nor against justices of the peace, for refusing a license to keep an inn or an ale-house.⁴ So, where an attachment was issued, under the provisions of a statute, on the oath of a party, by which the constable was directed to attach the goods and chattels of the defendant, his arms and accoutrements excepted; held, an action of trespass did not lie against the justice, because the constable took and detained the party's arms and accoutrements.⁵ But a justice of the peace, in making a return to a higher court upon an appeal, acts ministerially, and is responsible to the party injured for an error or misstatement in such return, though he be not influenced by corrupt motives.⁶ Or for issuing an execution within two or three hours after judgment.⁷ Or against the body of a debtor, knowing it to be unlawful.⁸ Or for refusing an appeal and issuing execution, if he act corruptly.⁹ So case lies against a justice of the peace, for that, after taking time to consider a case, he rendered judgment against the plaintiff, and deceitfully concealed the fact from him until it was too late to appeal.¹⁰ So a magistrate has no authority to order a person accused of a criminal offence, to be committed until a subsequent day for examination, without the accused being first brought before him. Accordingly, where a justice of the peace issued a warrant, for the arrest of an

¹ *Pike v. Carter*, 10 Moore, 376; 3 Bing. 78.

² *Linford v. Fitzroy*, 13 Ad. & Ell. N. S. 240.

³ *Chickering v. Robinson*, 3 Cush. 543.

⁴ *Bassett v. Goodschall*, 3 Wils. 121.

⁵ *Collins v. Ferris*, 14 Johns. 246.

⁶ *Houghton v. Swarthout*, 1 Denio, 589.

⁷ *Briggs v. Wardwell*, 10 Mass. 356.

⁸ *Sullivan v. Jones*, 2 Gray, 570.

⁹ *Tyler v. Alford*, 38 Maine, 530.

¹⁰ *Neighbour v. Trimmer*, 1 Harr. 58.

individual upon a criminal charge, late on Saturday night, with an indorsement thereon, directing that the accused should be committed until the following Monday, for examination, and the constable arrested the accused on the same evening and committed him to jail without first bringing him before the justice; held, that the justice had exceeded his authority, and that he, together with the constable and his assistants, were liable in trespass.¹ And trespass will lie against a magistrate, for committing a party, charged with felony, for reëxamination, for an unreasonable time, though without any improper motive.² So, if a justice of the peace, who has convicted a person of an assault and battery, allows him to go at large for nearly a year without payment of the fine and costs, and then issues a *mittimus*, without first issuing a *capias* for him to show cause why he should not be committed; the justice is liable in trespass.³ So a justice of the peace, who issues a warrant under an unconstitutional statute, is liable to an action by the party arrested. Bigelow, J., says: "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under stat. 1852, c. 322, § 14. But that section of the statute has been adjudged to be unconstitutional and void. It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others."⁴

5. As has been already explained, judicial protection extends to all judicial tribunals. The rule is laid down, that if the judge of an *inferior court* has jurisdiction, although he may give a wrong judgment, provided the error results

¹ Pratt v. Hill, 16 Barb. 303.

² Davis v. Capper, 10 B. & C. 28.

³ Doggett v. Cook, 11 Cush. 262.

⁴ Kelly v. Bemis, 4 Gray, 83.

from the erroneous conclusion at which he arrives, neither the judge nor the plaintiff in the judgment can be made a trespasser, by virtue of enforcing the same, if the judgment remains unrescinded and unpaid.¹ No person is liable in a civil action for what he has done as a judge, while acting within the limits of his jurisdiction.² But it is to be further remarked, that, if persons having a *special* or *limited* judicial authority do any act beyond the scope of their authority, they make themselves trespassers.³ Every such tribunal decides at its peril, and process issuing therefrom is no protection to the Court, attorney, party, or even a ministerial officer who innocently executes it.⁴ It is said, "The general rule of law, as to actions of trespass against persons having a limited authority, is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action."⁵ More especially, even a judge of a court of record is answerable for an act done by his command, when he has no jurisdiction, and is not *misinformed* as to the facts on which jurisdiction depends. Thus the plaintiff, who dwelt and carried on business at Cambridge, out of the jurisdiction of the Spilsby county court, was sued in that court by leave of the judge, under Stat. 9 & 10 Vict. c. 95, § 60, the cause of action having arisen within the jurisdiction of the Court; and judgment was duly obtained against him. Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby court, under § 98, calling upon the plaintiff to be examined as to his estate

¹ Deal v. Harris, 8 Md. 40.

² Burnham v. Stevens, 33 N. H. 247.

³ Blood v. Sayre, 17 Verm. 609.

⁴ Per Van Ness, J., Cable v. Cooper,
15 Johns. 157.

⁵ Per Abbott, C. J., Doswell v. Impey, 1 B. & C. 169; acc. Miller v. Seare, 2 W. Bl. 1151.

and effects, and, the plaintiff not appearing, the Judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be committed for his contempt. Held, the commitment was without jurisdiction, and as the judge had ordered it under a *mistake of the law* and not of the facts, he was liable in trespass.¹ So the warrant of a justice of the peace, who had no jurisdiction of the matter, is void, and the magistrate and all who act under it are liable for damages.² And, in general, a justice of the peace, who acts in a case of which he has no jurisdiction, or who exceeds his jurisdiction, knowing the facts which constitute the defect of jurisdiction, is liable in damages to any party injured.³ Thus a justice of the peace, who, in the course of the trial of a case, of which a police court has exclusive jurisdiction, or after finally disposing of a case, commits a witness to prison for contempt, is liable to an action by the witness.⁴ (a) So, where persons not inhabitants of a town are not liable to be taxed for the support of common schools in that town; if a tax be levied and assessed upon the property of such non-resident, *the trustees* who issue the warrant, as well as the collector who executes it, are trespassers.⁵ So trespass will lie against a *deputy clerk* for wrongfully issuing an execution, under which the plaintiff's property was sold.⁶ So, a commissioner in chancery having no power to commit a witness who refuses to testify before him; if he does so, he is a trespasser.⁷

¹ Houlden v. Smith, 14 Ad. & Ell. (N. S.) 841.

² Cohoon v. Speed, 2 Jones, Law, 133.

³ Piper v. Pearson, 2 Gray, 120; Clarke v. May, lb. 410.

⁴ Piper v. Pearson, 2 Gray, 120.

⁵ Suydam v. Keys, 13 Johns. 444.

⁶ Coltraine v. M^cCain, 3 Dev. 308.

⁷ Marsh v. Williams, 1 How. Miss. 132.

(a) It is sometimes held, that a justice has no power to commit for contempt. But where the Court erred in deciding otherwise, in an action of trespass against the justice, but admitted evidence of the circumstances of the alleged contempt; the error was held to be cured. Albright v. Lapp, 26 Penn. 99.

6. It is laid down, as a general rule, that justices of the peace, where the forms of law are substantially complied with, though the precision proper to be observed in indictments may be wanting in complaints before them, ought not to be held liable in damages, for acts done in the performance of their official duties.¹ But a magistrate is bound by an erroneous commitment, notwithstanding a previous regular conviction. Where, therefore, a warrant of commitment, under the statute, 5 Geo. IV. c. 14, for fishing in a private fishery, did not state that the offence was committed in enclosed ground; held, an action for false imprisonment was maintainable against the magistrate.² So, in an action against a magistrate for false imprisonment, the plaintiff proved a commitment for a certain alleged offence. The defendant proved a conviction of the plaintiff for an offence different from that recited in the commitment. Held, this conviction was no justification of the imprisonment.³ So the plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully killing his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said "he would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said "he would appeal." The defendant then called in a constable, and said, "take this man out, and see if they can settle the matter; and if not, bring him in again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money. Held, an assault and false imprisonment; and, as no conviction had been drawn up, the defendant could not justify.⁴ But, where a justice of the peace has jurisdiction, his conviction is conclusive evidence of the facts stated therein, if no defect

¹ *Alexander v. Card*, 3 R. I. 145.

³ *Rogers v. Jones*, 3 B. & C. 409.

² *Wickes v. Clutterbuck*, 10 Moore, 63.

⁴ *Bridgett v. Coyney*, 1 M. & Ry. 211.

appear on the face of it. Therefore, in an action of trespass against two justices, for seizing and detaining a decked and registered vessel on the Thames, having gunpowder on board, under the Bum-Boat Act, 2 Geo. III. c. 28, the owner cannot be let into evidence to show that she was not a boat within the meaning of that statute.¹

7. The question of judicial privilege has been raised, in case of positive neglect or violation of official duty, and where the party complaining was himself in fault. Thus, where a party brings a *certiorari* to reverse a judgment in a justice's court, and the judgment is affirmed by default of the plaintiff in error, in not appearing when the cause is called on the calendar; he may, notwithstanding, bring an action against the justice for a false return, who cannot plead that the judgment was affirmed by the default of the plaintiff.² So the question has arisen, as to the liability of a judge for excluding a party from a court-room. Thus a summary statutory proceeding, for keeping and using a gun to destroy game, was held to be of a judicial nature, at which all persons *prima facie* have a right to be present. Hence an action of trespass was held to lie against a magistrate, who during such a proceeding, without any specific reason, caused the plaintiff to be removed from the room, the latter claiming a right to be present.³ But trespass cannot be maintained against a coroner for ejecting a person from a room where he is about to take an inquisition.⁴ And it has been recently decided, that a justice of the peace, in the progress of a trial before him, has the power to cause any person to be removed from the court-room, whose presence, in the exercise of a sound judicial discretion, he deems prejudicial to the interests of justice.⁵

8. It has been held that an action does not lie against a person, for assuming without authority to act in a judicial capacity. Thus where A. was selected by the principal in a

¹ *Brittain v. Kinnaird*, 4 Moore, 50.

² *Ridgie v. Sackrider*, 14 Johns. 195.

³ *Danbrey v. Cooper*, 10 B. & C. 237.

⁴ *Garnett v. Ferrand*, 6 B. & C. 611.

⁵ *The State v. Copp*, 15 N. H. 212.

debtor's relief bond, to act as a magistrate in an adjudication upon the debtor's disclosure, and, upon such disclosure, united with B., the other magistrate, in giving a discharge-certificate to the debtor, when in fact A. had no authority to act as such magistrate; and thereby the surety in the relief-bond was compelled to pay it; held, the surety could not sustain an action against A., for wrongfully assuming to act as sub-magistrate.¹

9. A judicial officer cannot protect himself from a liability already incurred, by virtue of any illegal arrangement between the parties to the proceeding before him, in reference to the disposition of that cause. Thus a statute provided that any person, maliciously disturbing any dissenting congregation under that act, on proof before a justice of the peace, should find sureties in £50, or in default be committed to prison till the next sessions, and on conviction forfeit £20 to the crown. To an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties; that, before the next sessions, it was agreed between the prosecutor and the plaintiff, with the consent of the defendants, that the prosecution should be dropped, and the plaintiff discharged at the sessions for want of prosecution; and that the plaintiff was accordingly then and there so discharged, in full satisfaction and discharge of the assault and imprisonment. Held, no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a public misdemeanor, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices, their authority being at an end after the commitment, and their consent, subsequent to the dropping of the prosecution, a mere nullity.²

10. The protection and privilege in question have been

¹ Brookings v. Cunningham, 3 ² Edgcombe v. Rodd, 5 E. 294. Maine, 103.

held not to excuse gross ignorance and incapacity on the part of one assuming to serve in a *quasi* judicial capacity. Thus the declaration stated, that the plaintiff, rector of F., agreed with the executrix of the late incumbent, that dilapidations should be valued, as between them, by valuers to be appointed on each side, and, in case the valuers disagreed, by an umpire to be appointed by the valuers, and that such valuation should be final and conclusive; that the plaintiff, at the request of the defendants, employed them as valuers, for reward, to value the dilapidation on his behalf, and to use their best endeavors to procure the same to be settled at a reasonable amount as between the plaintiff and the executrix; and the defendants accepted the employment, and entered upon it, with a valuer appointed by the executrix on her behalf. Breach, that, through the defendant's negligence, the amount of dilapidations was settled by them and the valuer, at a less sum than they ought to have been settled at, whereby the plaintiff was obliged to accept from the executrix a smaller sum than he ought to have received. The evidence was, that the defendants were employed as alleged, and had agreed with the valuer of the executrix in valuing the dilapidations at too small a sum; having, through ignorance, valued as between incoming and outgoing tenant, instead of as between incoming and outgoing incumbent. Held, first, that the defendants were not sued as *quasi* arbitrators; but that the cause of action was their undertaking that they were competent, and the breach of that undertaking; and, secondly, that, although the defendants could not be expected to supply minute and accurate knowledge of the law, they ought to have known the broad distinction between the case of a tenant and that of an incumbent, and that their ignorance in that respect was a breach of their engagement.¹

11. It is to be further remarked, as a general qualification of judicial privilege, that judicial officers are not liable to

¹ Jenkins v. Betham, 29 Eng. L. & Eq. 283.

action or indictment, for acts done by them in a judicial capacity *within their jurisdiction*.¹ But, where justices or other judicial officers decide on a matter *not within their jurisdiction*, they are liable in an action. (a) And the doctrine has been broadly stated to apply, whether the want of jurisdiction applies to *place, persons, or subject-matter*.² But, in reference to this doctrine, and the case upon which it chiefly rests, it has been well remarked: "In the case of *Terry v. Huntington*, Hardr. 480, the Court seem to have been of opinion, that in an action of trespass the plaintiff might show that the commissioners had exceeded their jurisdiction, in adjudging a subject-matter to be within their jurisdiction which was not within it, *i. e.* in adjudging low wines to be strong wines. This, however, seems to be inconsistent with later authorities, particularly that of *Gray v. Cookson*. In these cases, the question, whether the subject-matter was or was not within the jurisdiction, was the very point upon which the commissioners in the one case, and the magistrate in the other, had to adjudicate; and therefore the same principle which protects a party who acts judicially, and gives effect to his judgments, until they have been reversed by proper authority, although he may have acted erroneously, extends to such cases, and to all where

¹ *Yates v. Lansing*, 5 Johns. 282; 9 Ib. 395; *Moor v. Ames*, 3 Caines, 170; *Brodie v. Rutledge*, 2 Bay, 69.

² *Terry v. Huntington*, Hardr. 480.

(a) In illustration of the respective liabilities of *judges, officers, and parties*, (see § 30,) it is remarked in an old and leading case: "The plaintiff has been illegally imprisoned under color of a writ sued out against him which is a mere nullity. He has been unlawfully injured, and must have a remedy; but he has none against the officer, who is not to exercise his judgment touching the validity of the process in point of law, but is obliged to obey the command of the Court, and he may justify under the writ though it be void. (6 Rep. 54 a.) But where a court has no jurisdiction of the cause, the whole is *coram non judice*, (2 Stra. 994,) and trespass and false imprisonment would lie against the vice-chancellor, judge, gaoler, officer, and all of them. (10 Rep. 76 a, b.)" 3 Wils. 345.

the question of jurisdiction arises upon matter of fact in the course of a cause, and therefore necessarily becomes the proper subject for adjudication in the cause."¹ (See p. 339.)

12. The exemption of judicial acts from liability for damages is sometimes stated with the qualification, that, if such acts are done *maliciously*, (a) the privilege does not apply. The malice, however, intended by the law in cases of this description, can hardly mean *actual* malice towards the party injured, but only that sort of implied malice which consists in, or is to be inferred from, a violation of some

¹ 2 Stark. Ev. 809.

(a) Thus it is held, that an action will not lie against a justice for a judicial act within his discretion, unless he has acted from malicious, impure, and corrupt motives. *Gregory v. Brown*, 4 Bibb, 28; *The State v. Campbell*, 2 Tyl. 177; *Bullitt v. Clement*, 16 B. Mon. 193.

So, that a justice acting officially, with jurisdiction and in good faith, is not answerable in trespass for his acts, although erroneous. *Hetfield v. Towaley*, 3 Iowa, 584.

A justice has been held liable to an action, for maliciously and unjustly refusing to grant an appeal. *Hardison v. Jordon*, Cam. & Nor. 454.

Where a justice of the peace maliciously grants a warrant against another without any information, upon a supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case. *Morgan v. Hughes*, 2 T. R. 225.

In trespass for an assault and false imprisonment, A. pleaded, that he was a justice of the peace, that a felony had been committed, that there was reasonable ground for suspicion that the plaintiff was guilty of said felony, and that, in consequence thereof, he had ordered the plaintiff to be arrested. Held, the plea was bad, for omitting to set out the grounds upon which the suspicion and belief of the plaintiff's guilt were founded. *Wasson v. Canfield*, 6 Blackf. 406.

In an action against a magistrate for a malicious conviction, the question is not, whether there was probable cause in fact for convicting, but whether he had any probable cause for convicting. *Gurley v. Bethune*, 5 Taun. 580.

In other words, in an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley v. Bethune*, 1 Marsh. 220.

rule by which the proceeding should have been governed. Substantially the same principle is stated and illustrated by an approved elementary writer, as follows: "The plaintiff may rebut the evidence of a conviction or other judicial act, by evidence showing the total illegality of the proceedings, by proof that the act was not a judicial one, *inter partes*, but was wholly unwarranted, fraudulent, and void. Thus he may prove that a warrant of commitment in case of felony was granted maliciously, and without any information to support it; or in case of a distress, or commitment under a conviction, that he was never summoned, and therefore had no opportunity to make his defence."¹ So in an action on the case it was alleged in the declaration, that the defendant, a justice of the peace, wilfully and maliciously received a false and groundless complaint against the plaintiff, for a criminal trespass, and thereupon wilfully and maliciously issued his warrant, upon which the plaintiff was arrested and carried before the defendant for trial, and was by him wilfully and maliciously tried and convicted, without being allowed an opportunity to obtain witnesses and counsel; that, upon such conviction, the defendant maliciously sentenced the plaintiff to pay a fine of two dollars and costs, and that, upon his refusing to pay the same, the plaintiff was committed, by the order and warrant of the defendant, to the common jail, where he remained imprisoned for one day, until, to obtain his discharge therefrom, he was obliged to and did comply with the defendant's order to pay the fine and costs imposed upon him by the sentence. Held, on general demurrer, that the action could not be maintained.² Shaw, C. J., remarks: "It is alleged, that the complaint was false, feigned, and groundless, and that the defendant knew it; but this was the very question to be tried, and the defendant could not judicially know it till a trial. His private knowledge could not prevent the complainant from having it tried. It is further

¹ 2 Stark. Ev. 807.

² Pratt v. Gardner, 2 Cush. 63.

alleged, that the defendant wilfully and maliciously tried and convicted the plaintiff, and sentenced him to pay a fine of two dollars and costs. The plaintiff alleges that he was not guilty, and that the defendant knew he was not guilty. These are facts, which the defendant is not bound to contest with the plaintiff." "It is stated that the defendant put the plaintiff on trial without allowing him an opportunity to obtain witnesses and proofs favorable to him, and also to obtain counsel. If this were so, however wrong in itself it might be, it cannot be tried here. Where the subject-matter and the person are within the jurisdiction of the justice, the question of continuance or postponement, for any purpose, is a judicial question, as much as the question whether the party on trial is guilty or not guilty." ¹ (a)

¹ Pratt v. Gardner, 2 Cush. 63, 71, 72.

(a) In reference to the mere *allegation* of malice in a case of this nature, the learned Judge speaks of "leaving out the epithets 'maliciously,' 'wilfully,' 'falsely,' with which the declaration is so thickly sprinkled, and which cannot change or qualify the material facts."

CHAPTER XX.

MINISTERIAL OFFICERS.—SHERIFFS, ETC.—GENERAL LIABILITIES
AS TO THE SERVICE OF PROCESS.

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| <ul style="list-style-type: none"> 1. General rights and duties of ministerial officers. 2. Jurisdiction, as affecting their liability. 4. Burden of proof; application of the rule "in pari," &c. 5. Justification of an officer, as depending upon the liability to seizure, of person or property. 9. Title of an officer to property taken by him, and right of action therefor. | <ul style="list-style-type: none"> 10. Actions against officers; form, &c. 11. Notice, before service of process. 12. Purpose and intent, as affecting an officer's liability. 14. Return of process. 21. Rights and liabilities of a sheriff in connection with his <i>deputies</i>. 29. Justification of persons acting under an officer. 30. Liability of <i>parties</i> for the acts of officers. 33. Damages. |
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1. THE other general class of public officers, by or against whom a private wrong may be committed, is that of *ministerial* officers, consisting chiefly of sheriffs and other officers of the law, charged with the execution of legal process. (a)

(a) With regard to officers in general—though in practice the remark is oftener applied to ministerial than judicial officers—it is said, that an officer *de facto*, is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office; being distinguished, on the one hand, from a mere usurper of an office, and on the other, from an officer *de jure*. *Plymouth v. Painter*, 17 Conn. 585. See *Bates v. Dyer*, 9 Humph. 162.

In reference to an English statute, passed for the benefit and protection of officers, it is said: "The defendant acted *colore officii*, and not *virtute officii*. A constable acting *colore officii* is not protected by the statute (24 Geo. II. c. 44, § 8). Where the act committed is of such a nature, that the office gives him no authority to do it, in the doing of that act, he is not to be considered as an officer. But where a man, doing an act within the limits of his official authority, exercises that authority improperly or abuses the discretion placed in him, to such cases the statute extends. The distinction is, between the extent and the abuse of the authority." Per *Ld. Ken-*

And, with regard to mere ministerial officers, although not entitled to the peculiar protection which the law extends to

yon, *Alcock v. Andrews*, 2 Esp. N. P. 542, n. See *Smith v. The State*, 19 Conn. 493.

With respect to the general responsibility of officers of the law to parties who may be injured by their neglect or violation of official duty, it is held that no action lies at the suit of an individual against an officer, for misbehavior in office, either from misfeasance or nonfeasance, unless the plaintiff can show a special damage peculiar to himself. *Butter v. Kent*, 19 Johns. 223; *Harrington v. Ward*, 9 Mass. 251.

But, whether the damage is suffered by the act or omission of a public officer, contrary to his duty, the party injured may maintain an action on the case against the officer. *Bartlett v. Crozier*, 15 Johns. 250.

Thus a sheriff is not liable to the action of a party injured by his neglect to preserve the peace, but only for his misfeasance or neglect in serving a process in which the plaintiff is interested, or for maliciously hindering or preventing the plaintiff from exercising some special right or privilege. *South v. Maryland*, 18 How. 396.

And the further distinction is laid down, that, if an officer is guilty of any act, under color of his office, directly affecting the rights of parties not named in his precept, they have a remedy against him. But if he omits the performance of any duty resulting from a precept in his hands, those alone can maintain an action against him therefor, who are parties thereto. *Moulton v. Jose*, 25 Maine, 76.

But the surety in an injunction bond may maintain an action against the sheriff, for leaving in the hands of the debtor property delivered to the sheriff by the debtor, and subsequently carried out of the State; whereby the surety was obliged to pay the debt. *Rowe v. Williams*, 7 B. Mon. 202.

In general, an officer may justify by the express terms of his process. Thus, where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the one from whom it is collected has no cause of action against the sheriff, though he claimed to be only a surety, and though the plaintiff in the execution directed the sheriff to collect it from the other. *Shufford v. Cline*, 13 Ired. 463.

The fact, that an officer is general agent for the collection of a debt, does not absolve him from his duties and liabilities as an officer, where he obtains a judgment on a note, and the *fi. fa.* comes to his hands. *Clingman v. Barrett*, 6 Humph. 20.

Gross negligence in the discharge of a fiduciary duty is evidence of fraud and misbehavior in office. *Commonwealth v. Rodes*, 6 B. Mon. 171.

those acting in a *judicial* capacity; yet the general principle is laid down, that, if a public officer errs in the discharge of his duty in good faith, he is not liable.¹ (a) More especially, where he is required to *exercise his judgment*, or does an act as judge or a judicial act, which is within his power and jurisdiction; unless it be proved that the act alleged to be injurious was wilful and malicious.² And the same protection has been extended to an immediate officer of a court, and acting in execution of an order of such court. Thus, in an action on the case against an officer of the Insolvent Debtor's Court, for improperly drawing up an order for the discharge of an insolvent, instead of his further imprisonment, the declaration alleged, that such officer wrongfully, falsely, and unlawfully made and issued a certain order, purporting to be an order from the Court. Held, on general demurrer, that, as it was throughout the declaration averred as purporting to be, and treated as an order, and had not been repudiated or rescinded by the Court itself, the action could not be maintained by a creditor of the insolvent against the officer for the discharge of the insolvent under such order.³

2. In relation to that class of ministerial officers, whose authority is most frequently questioned, viz: sheriffs and other officers, acting under the writs, warrants, or other precepts of

¹ Donahoe v. Richards, 38 Maine, 376.

² Reed v. Conway, 20 Mis. 22.

³ Whitelegg v. Richards, 6 Moo. 501.

An habitual neglect to account for small sums by a public officer authorizes and requires the presumption, that the sums retained and not accounted for were retained for sinister and selfish purposes; and a gross and unscrupulous negligence in the keeping of his accounts, instead of rebutting such presumption, strengthens and supports it. Commonwealth v. Rodes, 6 B. Mon. 171.

(a) But, "if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." Per Best, C. J., Henly v. Mayor, &c. 5 Bing. 107.

courts and magistrates; the rule already stated in relation to judicial officers—p. 326—is equally applicable, that, where a court has *jurisdiction* of the subject-matter, the officer is not bound to examine into the validity of its proceedings or the regularity of its process.¹ But *want of jurisdiction* in the court deprives the officer of the benefit of the process under which he seeks to justify himself. (a) Thus a warrant, issued by a justice of the peace without authority, affords no justification to the officer executing it.² Hence, where the law does not authorize a justice of the peace to receive a complaint and issue a warrant on the Lord's day, for a violation of the law merely by travelling; an arrest made on the Lord's day, by virtue of a warrant so issued, is illegal, and the officer making it is a trespasser.³ So an execution, issued by a magistrate against a person who has not been summoned before him is void, and the constable who levies such execution is a trespasser.⁴ So, where a justice notifies a constable, that an appeal has been entered, and execution in his hands superseded, any subsequent sale under the execution is void, and the constable is a trespasser. The regularity of the appeal is the justice's business and not the constable's.⁵ And, in general, where a court of competent jurisdiction issues a *supersedeas* to an execution in the hands of a sheriff, he need look no farther, but is bound to obey it; it is not for him to inquire of the propriety of granting the *fiat*.⁶ (b) So an officer will be protected in the execution of

¹ Warner v. Shed, 10 Johns. 138.

⁴ Tobin v. Addison, 2 Strobb. 9.

² Stephens v. Wilkins, 6 Barr, 260;

⁵ O'Donnell v. Mullin, 27 Penn. 199.

Hall v. Blaisdell, 1 Scam. 332.

⁶ Williams v. Stewart, 12 S. & M.

³ Pierce v. Atwood, 13 Mass. 324.

533.

(a) See p. 339. It is held that, where an officer acts under process in the discharge of his ministerial duty, and does not exceed his authority, he will be protected though the process is not sufficient; but, where he acts officiously and as a volunteer, he must himself show that the process was legal and sufficient. Hunt v. Ballew, 9 B. Mon. 390.

(b) The distinction is made, that a warrant, fair on its face, and showing jurisdiction in the person issuing it, will protect the officer acting under it,

legal process, more especially issuing from a court of general jurisdiction, if it appears upon the face of the process that the subject-matter is within the jurisdiction of the court.¹ So an officer is protected in the execution of process issued by a justice of the peace, which shows upon its face that the justice had jurisdiction of the subject-matter, if nothing appears to apprise him that the justice had not jurisdiction of the person. And the still more favorable rule has been adopted, that process protects the officer, even though issued by a justice of the peace, unless it appears on its face that it was issued by a court not having jurisdiction of the person, or unless he had notice in some other way that the process was issued without authority of law.² And it has even

¹ *Camp v. Moseley*, 2 Florida, 171; 410; *Churchill v. Churchill*, 12 Verm. 661. See *Miller v. Grice*, 1 Rich. 147; *Smith v. Miles*, 1 Hemp. 34.

² *McDonald v. Wilkie*, 13 Ill. 22; *State v. Crow*, 6 Eng. 342; *Higdon v. Barnes v. Barker*, 1 Gilm. 401; *Parker Conway*, 12 Mis. 295; *Camp v. Moseley*, 2 Florida, 171; *Decker v. Bryant*, 13 Ill. 602; *Whipple v. Kent*, 2 Gray, 7 Barb. 182.

as against the person named in the warrant; but where the rights of third persons are affected by the execution of the warrant, the preliminary proceedings establishing jurisdiction must be shown. *Decker v. Bryant*, 7 Barb. 102.

It is to be observed, that, in general, the *right* of an officer to serve a process is the measure of his liability for neglecting to serve it. Thus a sheriff, who receives an execution in favor of a private corporation, of which he is a member, is not liable for neglecting to levy and return it; although he served the original writ, by attaching property, and took a receipt for the property, and had prosecuted a suit against the receptor to final judgment, which was unsatisfied by reason of the insolvency of the receptor. *Bank, &c. v. Parsons*, 21 Verm. 199.

But a sheriff, having an execution running against the body of a party not liable to arrest, is not a trespasser for arresting him. And, on the other hand, the sheriff is not liable, in such case, for not making the arrest. *State v. Hamilton*, 9 Mis. 794.

And a sheriff is bound to serve process, though the proceedings were irregular. *Cody v. Quinn*, 6 Ired. 191.

Thus, in an action for failing to execute a *capias*, it is no defence that there was no affidavit which authorized such process. *Spence v. Tuggle*, 10 Ala. 538.

been held sufficient justification, if a process is regular and legal on its face, though the officer has knowledge of facts rendering it void for want of jurisdiction.¹ Thus a constable, who, pursuant to the unauthorized orders of a justice of the peace, arrests a witness and takes him before the justice to answer for a contempt, and commits him to prison, is not liable to an action, unless the justice's want of authority appears on the face of the *capias* or *mittimus*.² So, although the interest of a justice of the peace in a penalty, though ever so minute, takes away his jurisdiction of an offence, it is said to be not certain, that the officer who serves the process in such a case may not be protected against a suit for damages.³ So, if a justice of the peace, having been legally qualified to act as such, continues to act in the same capacity after accepting an incompatible office, he will be considered as a justice of the peace *de facto*, so far as third persons are concerned, and his warrant will justify the officer to whom it is directed in making service thereof.⁴ So if the writs of attachment, under which the sheriff justifies, are regular on their face, he is not bound to go beyond them, and show affidavits and bonds, or that there was a subsisting debt, on which they might properly issue.⁵ So it is held, that an action does not lie against a sheriff or his officer, for having arrested a certificated bankrupt, a discharged insolvent debtor, a peer, a party to a cause, or a witness *eundo vel redeundo*.⁶ Nor, it seems, for seizing under an execution *privileged articles*, such as arms for muster; at all events unless done with a knowledge that they are privileged.⁷ So an officer, who holds an execution in the common form, issued by a court having jurisdiction, against a defendant who had been discharged under an insolvent law, after the judgment was rendered, is not liable to an action of trespass, for arresting

¹ The People v. Warren, 5 Hill, 440.

See Sprague v. Birchard, 1 Wis. 457.

² 2 Gray, 410.

³ Pierce v. Atwood, 13 Mass. 324.

⁴ Commonwealth v. Kirby, 2 Cush.
577.

⁵ Kirksey v. Dubose, 19 Ala. 43.

⁶ Tarleton v. Fisher, 2 Doug. 671-
677.

⁷ The State v. Morgan, 3 Ired. 186.

and committing such defendant, although the defendant shows his discharge to the officer before he is arrested.¹ So an officer, holding an execution issued by a court of competent jurisdiction, is not bound to investigate the genuineness or sufficiency of a receipt shown to him by the debtor in settlement of the judgment.² Nor is it an excuse for a sheriff's failing to levy an execution upon a judgment, that the consideration of the judgment had failed.³ So an action will not lie against an officer, who arrests *Jonathan A. Trull* on an execution against *George A. Trull*, the former being the real defendant, and having been served with the original process, by the same erroneous name, but having suffered judgment by default.⁴ Nor for serving an execution, issued on a judgment rendered against a person described as being of A., when in fact he dwelt in B. The mistake in the addition of place should have been taken advantage of in abatement in the original action.⁵ (a) Though if an execution issue against an aggregate corporation by the name of "The President, Directors, and Company," &c., with directions to the officer for want of estate to take their bodies, the officer cannot arrest a member of the company by virtue of such execution.⁶ (b) Nor is a sheriff liable for executing, or justified in

¹ *Wilmarth v. Burt*, 7 Met. 257.

² *Twitchell v. Shaw*, 10 Cush. 46.

³ *Arnold v. Commonwealth*, 8 B. Mon. 109.

⁴ *Trull v. Howland*, 10 Cush. 109.

⁵ *Smith v. Bowker*, 1 Mass. 76.

⁶ *Nichols v. Thomas*, 4 Mass. 232.
See *Sanders v. Dowell*, 7 S. & M. 206.

(a) It was formerly held, that the sheriff cannot justify the arrest of the real defendant or the taking of his goods, where his name is mistaken in the writ. *Shadgett v. Clipson*, 8 E. 328; *Cole v. Hindson*, 6 T. R. 234; *Scandover v. Warne*, 2 Camp. 270.

So it has been held, that, where a defendant is arrested by a wrong Christian name, and the sheriff returns, "I have taken, &c., sued by the name of," &c., he is a trespasser. *Rex v. Sheriff, &c.* 1 Marsh. 75. Otherwise, if the party has admitted the name to be the true one, previous to the issuing of process. *Price v. Harwood*, 3 Camp. 108.

(b) In New York it has been held, that a *capias ad respondendum*, in a plea of trespass, generally, without indicating the character of the trespass,

refusing to execute, a writ issued under the judgment of a court having jurisdiction of the person and subject-matter, although *the judgment be erroneous*.¹(a) Nor for serving a warrant, issued in legal form, by a court having jurisdiction, and directing him to arrest a party; though the proceedings of the court in issuing the warrant may have been erroneous.² The distinction is taken, that process upon an *erroneous* judgment will justify the party and the officer; upon an *irregular* judgment, the officer only.³(b) Thus the sheriff

¹ Milburn v. Gilman, 11 Mis. 64;
Suydam v. Reys, 13 Johns. 444.

² Philips v. Biron, 1 Strange, 509;
Billings v. Russell, 23 Penn. 189.

³ Donahoe v. Shed, 8 Met. 326.

will not authorize the sheriff to hold the defendant to bail. *Patterson v. Parker*, 2 Hill, 598.

It is held, that, if a debtor is committed on a writ of execution, where it ought to have been levied on property, his remedy is by an action against the officer; the commitment is not thereby rendered void. *Warner v. Stockwell*, 9 Verm. 9.

(a) A sheriff, executing a *fi. fa.* after notice of the allowance of a writ of error or *supersedeas*, is liable in trespass, though there has been no further *supersedeas* of the execution. And notice to the sheriff is notice to his officers, and renders them liable in trespass for proceeding with the execution. *Belshaw v. Marshall*, 4 B. & Ad. 336.

But the notice must be actual and not constructive merely. *Morrison v. Wright*, 7 Port. 67.

But this privilege does not extend to a third person assisting the sheriff; as he acts voluntarily, and therefore does it at his peril. *Ibid.*

(b) Upon this ground an action does not lie against the sheriff, for the neglect of his deputy in the service of an execution, issued by a justice of the peace in the plaintiff's favor, upon a recognizance taken in pursuance of the statute of Massachusetts, of 1782, c. 21, by which the plaintiff lost his debt; where the execution misrecited the recognizance, both as to the sum in the recognizance, and as to the time of entering into it. *Albee v. Ward*, 8 Mass. 79.

But, in an action of trespass against an overseer of highways, he cannot justify by showing an order from the commissioners to open a road, unless it be shown to have been legally laid out. *Guptail v. Teft*, 16 Ill. 365.

An officer cannot seize property without an execution for that purpose; nor the property of third persons. *Yarborough v. Harper*, 25 Miss. 112.

Process cannot lawfully be served *after the return day*. And where an officer takes property on an execution which has expired, the defendants

made a levy on property, to which a claim was interposed, and upon the trial the plaintiff in execution was nonsuited, and the property directed to be restored to the claimant; which judgment was afterwards reversed by the Supreme Court, and the sheriff was afterwards proceeded against by motion for failing to make the money. Held, that he was protected by the judgment of the Court, though erroneous, in delivering up the property.¹ More especially, where a precept is lawful on the face of it, and in all its forms, the officer is protected, although it may be voidable for irregularity or mistake;² until set aside or reversed.³ Thus, where process is issued out of one court, with the seal of another attached to it, such process is erroneous, and is the same as if it had no seal; but the defect is amendable; and the process is not absolutely void, but voidable only, and is a good protection to the officer.⁴ So a writ, which has once been legally served, and then altered, by inserting a different date and return day, without the consent of the defendant therein; is not thereby rendered void, so as to excuse the officer, who served it originally, from again making service of it, when delivered to

¹ *Smith v. Leavitts*, 10 Ala. 92.

² *Keniston v. Little*, 10 Fost. 318.

³ *The State v. McNally*, 34 Maine, 210; *Stewart v. Ray*, 4 Ired. 269; *Wilton, &c. v. Butler*, 34 Maine, 431; *Parker v. Smith*, 1 Gilm. 411.

See *Banta v. Reynolds*, 3 B. Mon. 80; *Cogburn v. Spence*, 15 Ala. 549; *Avenett v. Thompson*, 15 Ala. 678.

⁴ *Dominick v. Eacker*, 3 Barb. 17.

may retake it, if they can do so without a breach of the peace. *Finn v. Commonwealth*, 6 Barr, 460; *Lofland v. Jefferson*, 4 Harring. 303.

So a delivery of possession under a writ of *hab. fac. pos.* furnishes no justification to a *previous* invasion of the land. *Smith v. Guild*, 34 Maine, 443.

A constable, having a warrant to search for certain specific goods, alleged to have been stolen, found and took away those goods, and certain others also, supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge. Held, he was liable to an action of trespass. *Crozier v. Cundy*, 6 B. & C. 232.

When a sheriff is sued in trespass, he must prove that he was sheriff. And if written authority is given by the sheriff to make a levy, testimony should be introduced to prove such special authority. *Calvert v. Stone*, 10 B. Mon. 152.

him for that purpose, subsequent to the alteration.¹ So an execution in the name of "A. B., use of officers of court," is not void, but gives protection to the officer levying it, if issued by a court of competent jurisdiction. The words "use of officers of court" may be treated as surplusage.² So a constable, in trespass for making an attachment, may give in evidence the process on which he made the attachment, notwithstanding the direction of the writ is not in the form prescribed by an existing statute, but is according to a former statute. And such process, if duly returned by him, will justify the taking, though the suit be pending in court at the time of the trial of the action of trespass.³

3. In further explanation of the protection or privilege dependent upon *jurisdiction*—see p. 333—it is held, that, where the *subject-matter* of the suit is not within the jurisdiction of a court, all the proceedings are absolutely void, and the officer, as well as the party, is a trespasser. But where the subject-matter is within their jurisdiction, and the want of jurisdiction is as to *person or place*, the officer is excused, unless the want of jurisdiction appears on the process.⁴ (See p. 326.) It is said, "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate, acting without any jurisdiction at all, is liable as a trespasser in many cases; but this liability does not extend to the constable, who acts under a warrant; and the statute 24 Geo. II. c. 44, was passed with this very object of protecting such officers."⁵ (a)

¹ Stoddard v. Tarbell, 20 Verm. 321.

⁴ Smith v. Shaw, 12 Johns. 257.

² McElhaney v. Flynn, 23 Ala. 819.

³ Stewart v. Martin, 16 Verm. 397.

⁵ Per Id. Abinger, West v. Smallwood, 3 M. & W. 420.

(a) It was held, in an old case, that, in trespass and false imprisonment.

4. With regard to the general liability of an officer for the execution of process committed to him, it is held, that for any breach of duty at least nominal damages will be given.¹ But there must be some affirmative evidence of neglect of duty; more especially of the officer's knowledge or means of knowledge of facts, which would have enabled him to make service, had he used due diligence.² Though, it is said, slight evidence will be sufficient to change the burden of proof in this respect.³(a) And in some cases the plaintiff

¹ Baker v. Green, 2 Bing. 317.

² 2 Greenl. Ev. § 584.

³ Beckford v. Montague, 2 Esp. 475.

for taking a man in execution on a judgment in an inferior court, the plaint and process are sufficient to justify the officer, although there was no cause of action arising within the jurisdiction of the court. Squib v. Hole, 2 Mod. 80; acc. Higginson v. Martin, Ib. 195; Crowder v. Goodwin, Ib. 59.

(a) In an action against the sheriff, for not levying on goods within his bailiwick, and for a false return, it was held, that, though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realized, if sold for the best price which the sheriff could have obtained. Mullett v. Challis, 2 Eng. L. & Eq. 260.

Where a sheriff is sued for a neglect of duty, it is no defence for him to show that the debtor, even after being imprisoned on a *ca. sa.*, may pay other *bond fide* debts, to the disappointment of the judgment creditor. The true inquiry is, has the creditor been deprived of any legal means of recovering his debt; and, if he has, the sheriff is liable for such neglect. Sherrill v. Shuford, 10 Ired. 200.

A declaration against the sheriff alleged, that, although the defendant could have levied of goods of the debtor within his bailiwick the moneys indorsed on the writ, yet the defendant, disregarding his duty, did not levy of the said goods the moneys or any part thereof; and that the defendant, further disregarding his duty, falsely returned, &c. Held, the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. Mullett v. Challis, 2 Eng. L. & Eq. 260.

A sheriff, who neglects to sell property under a *fi. fa.*, before the return day of the writ, is *primâ facie* liable for so much of the debt as equals in value the property levied upon. But, if the *fi. fa.* be placed in the sheriff's

must show, affirmatively, the nature of the claim which it was the object of the process to enforce. Thus, in an action for not serving a writ of mesne process, the plaintiff must prove a cause of action in the former suit.¹ (a) And the general

¹ *Alexander v. Macauley*, 4 T. R. 611; *Riggs v. Thatcher*, 1 Greenl. 68; *Gunter v. Cleyton*, 2 Lev. 85.

hands without the *bonâ fide* intention of selling the property; or if the plaintiff, after the levy has been made, enter into negotiation with the defendant, whereby the proceedings are interrupted and the debt lost; the sheriff is not liable. *Dorrance v. The Commonwealth*, 13 Penn. 60.

In an action against a sheriff for refusing to levy on a particular lot of land, a plea that the land was subject to mortgage, and therefore the levy would be valueless, is insufficient. *Lawson v. The State*, 5 Eng. 28.

In determining the sufficiency of a levy, the sheriff must exercise his own discretion and judgment, and, if he fails to levy on what a reasonable man would deem sufficient, if within his power, he will be liable to the plaintiff in execution for the deficiency, as he will to the defendant for an unreasonable excess. But, if the levy be originally sufficient, he will not be liable in case of a deficiency or excess, by reason of depreciation or advance in the value of the property. *Ibid*.

(a) What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact. *Whitsett v. Slater*, 23 Ala. 626.

A sheriff, on receiving a *fi. fa.*, is bound to levy on property sufficient to satisfy it, without delay. *Lawson v. The State*, 5 Eng. 28.

When the sheriff is ruled for failing to make the money on an execution, evidence that the defendant in execution "was in possession of a house and lot, as of his own property, prior to the day on which the execution came to the sheriff's hands, claiming ownership thereof, and continued in possession until after the return day of the execution," is admissible evidence for the plaintiff. *Whitsett v. Slater*, 23 Ala. 626.

A sheriff is not liable for failing to make the money on an execution, if the defendant, during the time the execution was in the sheriff's hands, had no property in his possession, unless it be shown that he was the owner of property which could have been levied on, and of which the sheriff had notice; but if the defendant during such time was in the possession of property, and the sheriff, without resorting to the steps necessary to protect himself from liability, returns the execution unsatisfied, he assumes the burden of showing that the property was not subject to the execution, and, unless he does so, must be held liable to the plaintiff. *The Governor v. Campbell*, 17 Ala. 566.

rule (see chap. 4) applies to this class of cases, that an action will not lie in favor of a plaintiff who has been himself in fault. It is held, that a sheriff will not be amerced, where the interference of the plaintiff has prevented him from discharging his duty.¹ Thus a sheriff is not liable for an insufficient return, if attributable to the plaintiff's instruction or interference, or a statement of facts made to the sheriff by the agent of the plaintiff.² So, where a plaintiff makes a mistake in the amount of his claim, in his petition, affidavit, and writ, and the sheriff who makes the attachment releases the property on the defendant's paying to him the amount in the writ and costs; though the plaintiff afterwards recover judgment for a larger amount, he has no cause of action against the officer.³ So, in an action by the defendant in an execution against the sheriff, for not having entered a sale of his land in the sheriff's books to A., which sale A. refused to comply with, so that a resale was made at a less price to B.; the sheriff may show in defence, that the price bid by A. was in consequence of the fraudulent misrepresentations of the execution defendant respecting his title.⁴ But the mere appointment of a deputy, on the nomination of the creditor, to execute a *fi. fa.*, does not discharge the sheriff from liability for the wrongful act of the deputy, (as in failing to levy and sell under an execution,) unless there be collusion or want of good faith in making the nomination.⁵ And where an execution creditor instructs a deputy sheriff to sell on credit, but he does not act in conformity with the instruction, this

¹ Stryker v. Merseles, 4 Zabr. 542.

² Page v. Belt, 17 Mis. 263.

³ Billingsly v. Rankin, 2 Swan, 82;
Robinson v. Harrison, 7 Humph. 189.

⁴ Ford v. Godbold, 2 Strobb. 109.

⁵ Martin v. Martin, 2 Jones, Law, 285.

Where a sheriff had levied on the property of a defendant in execution, and neglected to advertise and sell the same for nearly six months, not having time to do so before the next term of the court, and, just before the sitting of the court, an injunction was obtained by the defendant, restraining the plaintiff from collecting his *fi. fa.*; held, the sheriff was liable notwithstanding the injunction. *Neal v. Price*, 11 Geo. 297.

does not make such deputy the agent of the creditor, so as to discharge the sheriff from liability to such creditor for the wrongful acts of the deputy, in other particulars, in reference to such sale.¹ So, where on the plaintiff's *fi. fa.* was indorsed a stay of "sales only," and the plaintiff's attorney informed the sheriff that the stay was intended to apply only to the sale, and instructed him to levy immediately; held, the sheriff was liable to the plaintiff for neglecting to levy.² So an agreement by the creditor with the officer to postpone an execution sale, after a levy of an execution issued by a justice of the peace, does not absolve an officer from his duty to return the execution.³ So a release by the plaintiff of his own property, or property claimed by a third person, taken with property of the defendant on an execution, does not discharge the sheriff's liability for not making money from the defendant's property.⁴ Nor is it a defence to an action against a sheriff, for not levying and returning an execution, that it had been agreed between the plaintiff and the debtor, that the balance due upon the execution should be charged to the debtor upon the books of the plaintiff, and should be adjusted with their other book account, and that this agreement was mutually understood to be in discharge of all other liabilities and remedies; without evidence that the amount had been actually paid or adjusted, by a settlement of the current account embracing it.⁵ So an omission, by a party for whom a sheriff is acting, to interfere with him in the discharge of his duties, or to object to or complain of the manner in which he performs them, is no such evidence of assent to his neglect or violation of duty, as can properly be submitted to the jury.⁶ So, where property had been attached, judgment obtained, and execution issued, and placed in the hands of an officer for service; and, upon the officer's suggesting a doubt whether the property belonged to the debtor, the creditor directed him to inquire before levying,

¹ Sheldon v. Payne, 3 Seld. 453.

² Farrar v. Wingate, 4 Rich. 35.

³ Clingman v. Barrett, 6 Humph. 20.

⁴ Poe v. Dorrah, 20 Ala. 288.

⁵ Nye v. Kellam, 19 Verm. 548.

⁶ Moore v. Westervelt, 2 Duer, 59.

and afterwards the creditor gave to the officer a sufficient bond of indemnity, and directed him to sell the property, and also to levy upon another article of property, which had not been attached ; held, this afforded no evidence that the creditor had controlled the execution, so as to exonerate the officer from liability for neglecting to levy it.¹ So the owner of goods exempt from execution, who has subjected them to a mortgage payable on demand, by the terms of which he remains in possession until default, can maintain an action against the sheriff who seizes them under a *fi. fa.* in favor of another creditor. And, as between the plaintiff and the sheriff, the property will be treated at its full value.² (a)

5. With regard to the further justification of an officer in the service of process, depending upon the *liability* of the party, or the property of the party, upon whom such service is made ; it is the general rule, that, if an officer, in the execution of process, goes beyond its mandate, and takes property from the possession of a stranger, he can only defend himself by showing a better title in himself, or in him for whom he acts.³ But the distinction is made, that an *officer* may justify the seizure of property by alleging and showing a *fi. fa.*, from the proper tribunal, but *the plaintiff* in such execution must show the judgment on which it issued.⁴ (b)

¹ Chase v. Plymouth, 20 Verm. 469. on v. Walkins, 4 Eng. 139 ; Burton v.

² Livor v. Orser, 5 Duer, 501.

³ Lyon v. Goree, 15 Ala. 360.

⁴ Clay v. Caperton, 1 Monr. 10 ; Dix-

Sweaney, 4 Mis. 1. See Dobbs v. Jus-
tices, 17 Geo. 624.

(a) An officer may also, by his own act, preclude himself from setting up a defence which under other circumstances might be made. Thus, where payment of the amount collected by a deputy on an execution is demanded of the deputy by an agent of the creditor, and he promises to pay the amount at a future time, in an action against the sheriff for the money, it cannot be objected, that no evidence was shown of the authority of the agent. Barron v. Pettes, 18 Verm. 385.

So, where a statute requires a sheriff, on going out of office, to turn over processes in his hands to his successor by indenture and schedule ; if such successor or his deputy receive them without such formality, he is liable for their proper execution. Matthis v. Pollard, 3 Kelly, 1.

(b) But a party who seeks to justify the taking of property, under legal

So, where a plaintiff claims under a previous purchase from the defendant in the execution, the officer may show that such purchase was fraudulent as to creditors, and, in so doing, may show the judgment under which the execution was issued.¹ And he may justify neglect to serve an execution, by showing title in a third person,² or that the judgment is fraudulent, and that he holds another process in favor of

¹ *Stephens v. Frazier*, 2 B. Mon. 250. ² *Dobbs v. Justices*, 17 Geo. 624.
See *High v. Wilson*, 2 Johns. 46.

process, must show that he was an officer, and had lawful authority to take the property. Thus, in an action of trespass, the proof was, that the defendant admitted that he had levied on the property, at the same time exhibiting the execution and stating whom it was against; and, when asked whether he would disclaim the levy, he refused to do so. Held, sufficient to charge him as a trespasser, and that the admission involved no justification under the process. *Copely v. Rose*, 2 Comst. 115.

So, declarations of a defendant, in an action of trespass for the removal of personal property, made during the removal, that he was acting under an execution against the owner, are no proof of that fact. To make such execution a justification, it must be set up in the pleadings and legally proved at the trial. *Schultz v. Frank*, 1 Wis. 352.

So, in an action of trespass, the plaintiff called one of the defendants, who testified to the taking, and that it was done by virtue of a road-warrant. Held, that this statement made no justification, for it did not show that the warrant was in due and legal form, but the warrant itself should have been produced. *Mericle v. Mulks*, 1 Wis. 366.

So a justification in trespass, under a judgment and execution of A., a justice, requires proof that A. is a justice. *Hunter v. Harris*, 4 Blackf. 126.

But the officer is not required to show a sale of the property taken. *Burton v. Sweeney*, 4 Mis. 1.

When an execution comes to the hands of a sheriff after the expiration of his term of office, if he levies on and sells the defendant's property by virtue of it, he is liable in trover and trespass. So although the defendant, not knowing that fact, being present at the sale, did not ask a postponement. *Andress v. Broughton*, 21 Ala. 200.

So a constable cannot levy upon property after the return day of the writ; and, if he does so, he is a trespasser. But if a levy has been duly made before, the property may be taken away after, the return day. *West v. Shockley*, 4 Harring. 287.

another judgment creditor.¹ (a) Or that goods to be attached did not belong to the debtor.² Or prior attachments, sufficient to cover the whole value of the goods.³ But where a sheriff, sued for seizing the property of A., justifies by alleging that he seized it on process in favor of B., as the property of C., he is bound to prove the indebtedness of C. to B., and that the proceedings were instituted by him, and were correct.⁴

6. A constable, who has taken property out of his precinct, by virtue of mesne process, and who is sued in trespass for such taking, may show, in mitigation of damages, that, having taken the property to a place within his precinct, he attached it there, on the same process, as the property of the same debtor, subsequent to the commencement of the action of trespass against him.⁵

7. Where the owner of chattels suffers them to be mixed with those of another person, so that they cannot be distinguished, an officer will not be liable to an action of trespass, (nor, it seems, to any action) for attaching them as the property of the latter. But if, after the attachment, such owner points out his goods to the officer, and demands a redelivery

¹ *Pierce v. Jackson*, 6 Mass. 242; *Clark v. Foxcroft*, 6 Greenl. 296. See *Adams v. Balch*, 5 Greenl. 188; *Wilson v. Sparks*, 9 Tex. 621.

² *Canada v. Southwick*, 16 Pick. 556.

³ *Commercial, &c. v. Wilkins*, 9 Greenl. 28.

⁴ *Cross v. Phelps*, 16 Barb. 502; *Sanford, &c. v. Wiggin*, 14 N. H. 441.

⁵ *Stewart v. Martin*, 16 Verm. 397.

(a) If the sheriff sets up the defence that the goods in his hands were applied to a prior execution, the plaintiff may show that such execution was fraudulent, and the sheriff notified not to pay over the money to the creditor therein. *Warmoll v. Young*, 5 B. & C. 660. And the same answer may be made to the defence of a transfer by the debtor himself. *Dewey v. Bayntun*, 6 E. 257.

The rule which requires an officer levying on property, in justifying against strangers, to show a valid judgment, as well as execution, does not apply, where voluntary assignees of the defendant in execution, who became such after the levy, are the claimants. In such case, the production of the execution is sufficient. *Heath v. Westervelt*, 2 Sandf. 110.

of them, and the officer notwithstanding sells them, the sale will be a conversion.¹

8. If an officer would take goods belonging to A., and in A.'s possession, upon a writ against B., A. may maintain his possession by force, in the same manner as he might against any other trespasser.²

9. Upon the general ground of *possession* (see chap. 10) as sufficient to maintain an action for tort, a sheriff may maintain either trover or trespass, for goods taken out of his hands, after seizure by virtue of a *feri facias*; for he has a special property in them. In trover, it is held, he can recover only the value of the goods; in trespass, damages for the tortious taking.³ (a) So trover may be maintained by an officer against a debtor, for property which had been owned and possessed by the debtor, and receipted by him to the officer as attached, though it was not actually seized, or ever seen, by the officer.⁴ So, where a constable levies an execution upon property, he has a special interest therein, as against the owner, to the amount due upon the execution, including his fees. And, in New York, if the debtor brings replevin against the officer, and the latter has a verdict in his favor, the jury should assess the value of the property at that amount.⁵ And it is no defence, in a suit by an officer, that there may be property enough remaining to satisfy the execution.⁶ So although, if a levy be wantonly excessive, an

¹ Shumway v. Rutter, 8 Pick. 443.

⁴ Pettes v. Marsh, 15 Verm. 454.

² Commonwealth v. Kennard, 8 Pick. 133.

⁵ Seaman v. Luce, 23 Barb. 240.

³ Wilbraham v. Snow, 1 Mod. 30.

⁶ Per Gridley, J., Marsh v. White, 3 Barb. 518.

(a) A sheriff of another state may sue to recover sequestered property fraudulently taken out of his possession; and recover the expenses he has been compelled to incur in order to remove it. *Newman v. Wilson*, 1 La. Ann. R. 48.

It is held that the possession of personal property by the *deputy* of a sheriff, in virtue of a levy, is the possession of the sheriff, *Easley v. Dye*, 14 Ala. 158; and that a deputy sheriff cannot bring trover or trespass for goods seized by him on execution, and taken from him by another; though the sheriff may. *Hampton v. Brown*, 13 Ired. 18.

execution debtor may have his remedy by an action on the case; the officer's right of property is in no way affected by this circumstance.¹ (a) But a sheriff, after *teste* of a *fi. fa.*, but before an actual levy, has not such a property in the goods of the defendant, as will enable him to maintain trover against a person who tortiously takes them away, and converts them to his own use.² Nor can a constable maintain an action against a stranger, for taking away property levied on by him, after he has made a return upon the execution, by which, by order of the plaintiff, he has formally released the levy.³ (b) And where property is levied upon by virtue of an *attachment*, and subsequently another levy is made upon the same property by virtue of a second attachment, the officer making the second levy is not entitled to maintain an action of trover against a sheriff who illegally takes and sells the property.⁴ So in an action of trover, brought by an officer who has levied under an execution, against parties engaged in a second levy on the same property, they may show circumstances of fraud to defeat the action, equally as if it had been brought by the creditor himself.⁵

10. With regard to the forms of proceedings against officers, acting under process of law, it is held that trespass against the officer is the proper remedy where goods are

¹ *Dezell v. Odell*, 3 Hill, 215.

⁴ *Dubois v. Harcourt*, 20 Wend. 41.

² *Hotchkiss v. M'Vickar*, 12 Johns. 403.

⁵ *Farrington v. Sinclair*, 15 Johns. 428.

³ *Marsh v. White*, 3 Barb. 518.

(a) But the plaintiff in an execution cannot sue a stranger for removing property levied on, where there was enough property left to satisfy the execution, and the plaintiff either released such residue, or lost his lien upon it by his own negligence. *Marsh v. White*, 3 Barb. 518.

(b) But, in an action of trespass brought by a constable, for the taking away of property levied upon by him under an execution, but of which he has taken no actual possession, the action being brought for the benefit of the execution creditor; the plaintiff must prove a *judgment*, if required to do so. Proving the *execution* alone is not sufficient. *Pryne v. Westfall*, 3 Barb. 496.

wrongfully taken under color of legal process; and actual possession of the plaintiff is not necessary, but only a right of possession.¹ But for mere neglect or *nonfeasance*, as in other like cases, trespass on the case is the proper remedy. (a) And trespass on the case, for any mere nonfeasance of a deputy, will only lie against the sheriff.²

11. The necessity of *notice*, in order to enable an officer to justify under legal process, is sometimes brought in question.

12. In an action for assault and battery, committed on an officer by one whom he was attempting to arrest on a warrant, the defendant set up, by way of rejoinder, that the plaintiff, at the time, &c., did not acquaint or give notice to the defendant that a warrant had been issued, or that he had any warrant, or process, &c., nor did the defendant know that any warrant had been issued, or that the plaintiff had any warrant or process; to which the officer surrejoined, that he did acquaint and give notice to the defendant that a warrant had been issued, &c., concluding to the country. The issue having been found for the defendant, held, not a case for a judgment *non obstante veredicto*, and that he was entitled to judgment, though several other issues were found against him.³ (b)

13. And, in general, it is held, that the officer, having authority, need not at the time claim to act under his precept or any other authority.⁴ (c) Thus, in trespass for break-

¹ Codman v. Freeman, 3 Cush. 306.

³ Bellows v. Shannon, 2 Hill, 86.

² Abbott v. Kimball, 19 Verm. 551.

⁴ State v. Elrod, 6 Ired. 250.

(a) See *Trespass, Case*.

(b) An indictment, for assaulting and obstructing an officer in the discharge of his duties, as such, averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly, and designedly" hinder and oppose him, &c. Held, a sufficient allegation, that the defendant knew that he was an officer. *Commonwealth v. Kirby*, 2 Cush. 464.

Also, if it were otherwise, that this is not a ground for arresting the judgment, but only for sentencing the defendant for the simple assault. *Ibid*.

(c) With regard to a claim against an officer for positive wrong or malice

ing and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process, if he had it in fact at the time, though he declared then that he entered for another cause.¹ So, where a defendant was in prison under an invalid process, and the sheriff, without telling his deputy, the jailer, that he had in his own hands a valid process, ordered him to retain the prisoner; held, in an action for false imprisonment, that the possession of a valid process by the sheriff was a good defence for the acts of his deputy, though the latter was ignorant of the fact.² But, in trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *feri facias*, to which the plaintiff replied *de injuriâ sua propriâ absque residuo causæ*, and new assigned, that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea. Held, that it was competent to the Judge to leave it to the jury to say, whether the goods were *bond fide* taken under the writ, or whether the execution was resorted to as a color for taking them, and not to effect a levy by virtue of the writ.³

14. Questions often arise, involving the duty and liability of officers in relation to the *return* of legal process. (*a*)

¹ *Crowther v. Ramsbottom*, 9 T. R. 654.

² *Meeds v. Carver*, 8 Ired. 298.

³ *Lucas v. Nockells*, 1 Moo. & P. 783.

in connection with an official act; if a surety in a debtor's bond, before the condition had expired, applied to the officer for information as to its date, and the officer stated to him a time later than its true one, the surety cannot maintain an action against the officer in consequence of such erroneous statement, unless he knew it to have been false, or made it with an intention to deceive. *Moulton v. Jose*, 25 Maine, 76.

But, in an action against the sheriff for causing, by his wrongful representations, property seized by him under legal process to be sold for less than its value, it is not necessary to aver that the representations were made *maliciously*. An averment that they were made falsely and fraudulently is sufficient. *Griffin v. Isbell*, 17 Ala. 184.

(*a*) In regard to the mode of *proving* a return or the want of it, it is

15. It is held in an old case, that a justification under a returnable process is ill, without showing a return of it. And, if the plaintiff in the action join with the officer in the plea, there must be judgment against both.¹ (a) The dis-

¹ *Middleton v. Price*, 2 Stra. 1184; *Henry v. Tilson*, 19 Verm. 447.

held, that the question whether a writ of attachment was ever returned, being a fact which cannot be determined by inspection of the record, is a question for the jury. *Parks v. Hall*, 2 Pick. 206; *Hinman v. Brees*, 18 Johns. 529.

(a) A sheriff is not liable to an action merely for omitting to return an execution till after the return day. *Commonwealth v. Magee*, 8 Barr. 240.

It is not the duty of a sheriff to return process to any one but the clerk or his deputies. *Casky v. Hairland*, 18 Ala. 315.

But it is not a defence to a suit against an officer, for neglecting to return a process to the proper term of the court, that he had tendered it to the clerk, who had refused to receive it; nor that the clerk had died during the term. *Hamlin v. March*, 9 Ired. 35.

Although, if a sheriff makes a false return on a writ, the party injured has his remedy by suit; the sheriff cannot be compelled to amend his return, and return a particular state of facts. *Humphries v. Lawson*, 2 Eng. 341.

Where executions are by law returnable to the term next their issuing, unless the plaintiff otherwise order; if, by mistake, one is made returnable to a day in vacation later than the next succeeding term, the officer is yet bound to make return to such term; and, for failure to make such return, he is liable for the full amount of the debt. *Milburn v. The State*, 11 Mis. 188.

In an action against a sheriff for a false return upon a writ of replevin, if the defendant do not plead the general issue, nor any special plea denying that the original suit was well founded, it is admitted to have been so. *The State v. Youmans*, 1 Cart. 217.

But, in an action against a sheriff for a false return upon a *fi. fa.*, the plaintiff must show that the judgment upon which it issued was a valid one. *McDonald v. Bunn*, 3 Denio, 45.

In an action against a sheriff for neglecting to return a *fi. fa.*, where there is no averment that the debtor had real estate, and there is evidence that there was not sufficient personal property, the plaintiff cannot show that the debtor had real estate. *Stevens v. Rowe*, 3 Denio, 327.

A sheriff may defend a motion against him for failing to make due return of an execution, by proving that the execution was not supported by a

tion is made, however, that, in order to justify under *final process*, the sheriff is not required to show its return. Otherwise, in case of *mesne process*, which is merely the foundation of further proceedings.¹

16. An officer is liable for a *false return*; and this whether it be positively or negatively false. Thus an action on the case will lie, for suppressing material facts in the return to a mandamus.² So for a return false in substance, though true in words.³ Or though made false through ignorance or mistake.⁴ But not where the return is not false in fact, but only draws an incorrect legal inference from facts which are truly stated.⁵ So although, after the return of *nulla bona*, the creditor brought another action and recovered a new judgment.⁶ (a)

17. It is held that an officer is liable to an action, for neglecting to return an execution according to the precept thereof, although the judgment creditor suffers no injury by such neglect.⁷ And, in an action against a sheriff, for not returning an execution, where the defendant had real estate within his precinct, the measure of damages is the amount of the judgment, with interest.⁸ So, if a sheriff, having final process in his hands against the body of a debtor, have an

¹ Rowland v. Veale, Cowp. 18; Freeman v. Bluett, 1 Salk. 410; Brown v. Bissett, 1 N. J. 46.

² The King v. Lyme Regis, 1 Doug. 158, 159.

³ Ibid.

⁴ Houser v. Hampton, 7 Ired. 333; Clarke v. Gary, 11 Ala. 98.

⁵ Lemit v. Mooring, 8 Ired. 312.

⁶ Pitcher v. King, 9 Ad. & Ell. 288.

⁷ Goodnow v. Willard, 5 Met. 517.

⁸ People v. Lott, 21 Barb. 130.

judgment. But it will not avail him, to show that the execution was returned the day after the day appointed, and quashed for some defect in itself alone. Shute v. McRae, 9 Ala. 931.

(a) It is held, in an old case, that an action on the case will not lie against a sheriff, for returning *cepi corpus et paratum habeo*, although the party arrested do not appear. Page v. Tulse, 2 Mod. 83.

No action lies against the sheriff, for a false return of *nulla bona* by his bailiff, to a writ of *fi. fa.* issued out of his county court, although the defendant had notice of the goods, and the return was made with his privacy and by his direction. Pitcher v. King, 9 Ad. & Ell. 288.

opportunity to arrest him, and neglect to do so, and afterwards, within the life of the execution, the debtor absconds, and the sheriff thereupon makes a return of *non est inventus* upon the execution; he is liable for the amount of the execution and interest, though the debtor was insolvent.¹ But on the other hand it has been held, that, in an action for false return, the defendant may offer evidence of the real damage thereby caused to the plaintiff. And no action is maintainable, without averment of special damage, against the sheriff, for a false return to a writ of *fi. fa.*, where, necessarily, no damage could result to the creditor; the goods in question having vested in the assignees of the debtor, who had become bankrupt.² So it is a good defence to an action for failing to return an execution, that the levy or the judgment was fraudulent and void; provided, in the latter case, the sheriff hold the process of another creditor against the judgment debtor.³ So it is a good defence to an action for false return, that the plaintiff, with full notice of the facts, assented to such return.⁴ Thus a justice of the peace issued a notification, that a debtor committed on execution intended to take the poor debtor's oath at a certain time, and an officer returned, that he had served a copy on the creditor, whereas, by the supposed copy, a different time was fixed. At the time appointed in the original notification, the debtor took the oath, in the absence of the creditor, and was discharged. In an action by the creditor against the officer for a false return; held, the officer might give in evidence, in mitigation of damages, that the debtor had no attachable or visible property; and if this, in connection with the other evidence in the case, should satisfy the jury that the debtor was entitled to take the oath, the plaintiff ought to recover only nominal damages.⁵ So, where a summons was issued from a justice's court against A., which the constable, by mistake,

¹ Goodrich v. Stair, 18 Verm. 227.

² Wylie v. Birch, 3 Gale & Dav. 629; acc. Nash v. Whitney, 39 Maine, 341.

³ Bradley v. Windham, 1 Wils. 44; Clark v. Foxcroft, 6 Greenl. 296.

⁴ Stuart v. Whitaker, 2 C. & P. 100.

See Beynon v. Garrat, 1 Ib. 154; Holmes v. Clifton, 10 Ad. & Ell. 673; Smallcomb v. Cross, 1 Ld. Raym. 251.

⁵ Woods v. Varnum, 21 Pick. 165.

served upon B., and returned the summons *personally served*, and judgment was rendered against A., for a penalty alleged to have been incurred by a violation of a statute; in an action brought by A. against the constable for a false return, the defendant may show in mitigation of damages, that A. had actually been guilty of the offence for which judgment was rendered against him; for, as the defendant acted in good faith, the plaintiff ought not to recover more than his actual damages, and having alleged, in his declaration, that by the false return he was prevented from making a defence, when he had a good and substantial one on the merits, the evidence in question is a proper answer to this averment.¹ And a sheriff is not liable for an insufficient return, if attributable to a statement made to him by the agent of the plaintiff.² Nor for a mere false expression of opinion as to his return. Thus a deputy sheriff, who had returned a *fi. fa.*, was inquired of, some months afterward, by the plaintiff, whether the return was in due form of law, and the deputy, intending to deceive, answered that it was; whereupon the plaintiff filed a creditor's bill against the execution defendant, but lost the advantage thereof by insufficiency of the return. Held, an action for deceit would not lie against the deputy, inasmuch as the inquiry made of him related merely to his opinion upon a question of law; and, even if the inquiry had been specifically directed to the words of the return, and the deputy had answered falsely, the action could not have been maintained; for the plaintiff had the means of attaining correct information completely within his reach, without resorting to the deputy.³ (a) So,

¹ Green v. Ferguson, 14 Johns. 389.

² 2 Swan, 82.

³ Per Bronson, J., Starr v. Bennett,

5 Hill, 303.

(a) But an officer, who has, under a writ of replevin, entered on land and taken property, in order to justify, must make his return on such writ; and, if he does not return, and the plaintiff is instrumental in preventing such return, the plaintiff cannot justify under it, unless the defendant

where neither the body nor property of a debtor is within the reach of a sheriff holding an execution, and he neglects to return the execution to the proper office within its life, with his return of *non est inventus*, he is liable to the creditor only for actual damages.¹

18. A return is not false, although not fully completed at the time at which the act returned is stated to have been done. Thus an execution was delivered to an officer, with directions to levy it on real estate; and the officer, without entering on the land, immediately made a memorandum on a separate paper (noting the day and hour) that he then took the land in execution. He afterwards caused the land to be set off, and dated his return as of the above day and hour. Held, the return was not false, and the levy took effect, by relation, from that time.²

19. The return of an officer, while, as between third persons, (a) conclusive evidence of the facts stated in it, is also at least *prima facie* evidence in favor of the officer himself; and, except in an action for false return, has been held not open to contradiction by other evidence. Thus when an

¹ Kidder v. Barker, 18 Verm. 454.

² Hall v. Crocker, 3 Met. 245.

assented thereto. This rule does not apply, however, to those who acted by the authority of the officer under the writ. Allen v. Feland, 10 B. Mon. 306.

(a) The return of a sheriff, that dower had been set forth, on a writ of seizin of dower, by three disinterested freeholders, is conclusive; and, if not true, he is liable to an action for a false return. Estabrook v. Hapgood, 10 Mass. 313.

When an officer's return of an execution states that he levied it on the land of the judgment debtor, for whom he appointed an appraiser, after giving due notice in writing to said debtor, "who neglected and refused to choose for himself;" the return must be taken to be true, in an action brought by the judgment creditor for a trespass on the land; and the defendant in such action cannot impugn the levy, on the ground that the officer did not, after taking the land, allow the judgment debtor a reasonable time to appoint an appraiser, as required by statute, although all the proceedings are returned with the date of a single day. Tyler v. Smith, 8 Met. 593.

officer, in his return of the levy of an execution, states that he delivered to A., the agent of the execution creditor, seizin and possession of the premises levied on; such creditor, in an action against the officer for a defective levy, cannot give evidence that A. was not his agent.¹ So, where an officer returns on a warrant, directing him to search the buildings of S. for certain described stolen goods, "by virtue of this warrant, having made diligent search, and found three pieces of goods in the house of the within-named S., and arrested the body of the within-named S., and have him," &c.; this return is *prima facie* evidence, at least, that the officer had found three pieces of the goods described, and justifies him in arresting S., and carrying him with the goods before a magistrate.² In general, however, in an action against a sheriff, his return may be contradicted by the plaintiff, even though he were a party to the process on which the return was made.³ Thus, where a sheriff defended his return on the ground that the debtor was servant of an ambassador; it was held that the plaintiff might show the appointment to that office to have been colorable and illegal.⁴ And, on the other hand, where a return of the sheriff, as upon a writ of attachment, fixes on him a liability to the plaintiff, it is not competent for him, in a suit by the latter, founded on such return, to prove that it is incorrect. A direct application for leave to amend the return should be made to the Court whence the process issued.⁵ And in general the return of an officer is conclusive evidence against him. (a) Thus, where an officer

¹ Bates v. Willard, 10 Met. 62. See Bruce v. Holden, 21 Pick. 187.

² Stone v. Dana, 5 Met. 98.

³ Barrett v. Copeland, 18 Vern. 67.

⁴ Delvalle v. Plomer, 3 Camp. 47.

⁵ The Governor v. Bancroft, 16 Ala. 605.

(a) In an action by the plaintiff in an execution against the sheriff, on his return of the execution levied, it is no defence, that the property levied on was not the property of the defendant. *Miller v. Commonwealth*, 5 Barr, 294.

But where the sheriff returned upon an execution, that before its delivery

returns on a warrant of distress, that he advertised the goods distrained twenty-four hours before the sale; he cannot give parol testimony, in an action of trespass against him for taking the goods, that he in fact advertised them forty-eight hours before the sale.¹ So, if a sheriff return that he has made the money and satisfied an execution, when in fact he had received payment in something else, he makes himself liable for money.² So the return of the sheriff, that he has levied on certain property by virtue of the writ, is an affirmation that it is the property of the defendant.³ But, in an action to which an officer is party, he may offer other evidence than his return of his own doings. Thus, in trover by an officer against a stranger, for a chattel seized on execution, the officer is not required to prove the seizure by a return on the execution, but may prove it by parol evidence.⁴ And the mere omission to comply with some legal formality in his return will not make the officer a trespasser. Thus, in an action of trespass for taking and carrying away a wagon, the defendant offered in evidence a writ of attachment, directed to him as an indifferent person for service, and by virtue of which he took the property. Held admissible, although the defendant did not make oath to his return, before judgment in the suit upon which the property was taken.⁵

20. The particular facts upon which the officer would rely, as exempting him from liability upon his general return, should be specifically stated.⁶ (a) Thus when a sheriff

¹ *Parrington v. Loring*, 7 Mass. 388.

² *Tiffany v. Johnson*, 27 Miss. 227.

³ *Thornton v. Winter*, 9 Ala. 613.

⁴ *Hovey v. Lovell*, 9 Pick. 68.

⁵ *Edmonds v. Bucl*, 23 Conn. 242.

⁶ See *Barnett v. Bass*, 10 Ala. 951.

to him another against the same party was placed in his hands, upon which he seized the debtor's goods; held, in an action for false return, he was not estopped to deny that the goods belonged to the debtor. *Remmett v. Lawrence*, 1 Eng. L. & Eq. 260.

(a) A return to a *fi. fa.*, that the judgment had been satisfied by the defendant in execution, is bad. *Abercrombie v. Chandler*, 9 Ala. 625.

When a sheriff is sued for failing to return an attachment, it is no defence

is prevented by force from arresting a defendant, he should return the facts in excuse; but a return of *non est inventus*, in such case, is a false return.¹ So the return of "*cepi*," upon a writ of *ca. sa.*, is a sufficient return, and signifies that the sheriff has taken the body of the defendant, and has him ready to be produced, &c., and is *prima facie* evidence of those facts. But in an action on the sheriff's bond for an escape, the plaintiff may deny and disprove such return; and, after a permissive escape has been proved, the burden of proof is upon the sheriff, to show that his return is true.² So it has been held, that a sheriff, having returned that he had levied on the property of the defendant in a *fi. fa.*, is estopped to deny the truth of such return.³ And a levy by an officer, even though not conclusive record evidence of the defendant's title, raises a strong presumption against the officer, which he must repel by proof. Hence, when a sheriff has indorsed a levy on property, which is afterwards taken from him by a writ, it is proper he should state the fact in his return; though his omission to do so will not preclude him from proving the fact by evidence *aliunde*.⁴ So a sheriff's return to a *fi. fa.*, setting forth as an excuse for not having sold and collected the money, that the goods were casually destroyed by fire; or a return of a judge's order to stay proceedings; is *prima facie* evidence of the fact, even in his own favor.⁵ So a return of *nulla bona* to a writ of *fi. fa.* means *no goods applicable to the plaintiff's*

¹ *Homer v. Hampton*, 7 Ired. 333.

⁴ *The Governor v. Gibson*, 14 Ala.

² *State v. Lawson*, 2 Gill, 62.

326.

³ *Sutton v. Allison*, 2 Jones, Law, 339.

⁵ *Browning v. Handford*, 7 Hill, 120.

that the property levied on was not subject to attachment. *The Governor v. Baker*, 14 Ala. 652.

Nor that the debt has been paid. *Ibid.*

But he may show, in mitigation of damages, that by a mortgage and sale of the property, previous to the seizure, the defendant had parted with his interest. *Ibid.*

writ. Therefore, where a declaration, for a false return of *nulla bona*, alleges, that the sheriff took in execution goods of the judgment debtor of the value indorsed on the writ, and levied the same thereout; to which the defendant pleads, that he did not levy *modo et formâ*; the defendant may show that the plaintiff's judgment was obtained by fraud, and that the defendant had paid over the proceeds of the levy to another execution creditor, although the writ of the latter was subsequent in date to that of the plaintiff's.¹ (a) So, if a sheriff be ruled for failing to make the money on an execution, which he had levied on certain negroes, as the property of the defendant, he may rebut the *primâ facie* liability which his return raises against him, by showing that the negroes were taken from his possession under a writ of *habeas corpus*, and were discharged as free persons, and the writ of *habeas corpus*, and proceedings thereon, are admissible evidence for that purpose.² So the return indorsed upon a *fi. fa.*, stating the fact of a levy upon

¹ Shattock v. Carden, 11 Eng. L. & Eq. 570.

² Union Bank, &c. v. Benham, 23 Ala. 143.

(a) A creditor in a junior execution cannot sustain an action against the sheriff for falsely returning it *nulla bona*, by proof that a prior execution was issued on a judgment, confessed with intent to defraud creditors, and that the sheriff was notified of that fact while both executions were in his hands, and also that a claim would be made, on that ground, to have the proceeds of property levied on applied on his execution. In such case, it is the duty of the junior execution plaintiff to move, without unreasonable delay, and procure a stay upon the sheriff's returning the prior execution, until his motion can be heard and decided. It is no part of the sheriff's duty, unless cognizant of facts incontrovertibly establishing the fraud, to take the risk of the controversy, as to the validity of the judgment claimed to be fraudulent as against creditors; but only, after being notified that proper proceedings will be taken to determine the controversy, to retain the money levied on for a reasonable time. But, in such action, he cannot justify under a levy by a prior execution, which he has also returned *nulla bona*. He must either have executed it, and applied the proceeds of the property upon it, or have it in his hands so as to be bound to execute it and make such application. Paton v. Westervelt, 2 Duer, 362.

the defendant's property, is admissible evidence for the sheriff, in an action against him *by the defendant*, though the *fi. fa.* has not been filed in the clerk's office.¹ So a sheriff was sued for breaking and entering the plaintiff's dwelling-house, after being forbidden so to do, and his right thus to enter depended upon his having previously levied upon personal property therein. Held, a statement of such levy, indorsed by the sheriff upon the *fi. fa.*, which had not been filed, with an inventory of the goods levied on attached thereto, was competent evidence for him of the facts stated in it.²

21. A sheriff is responsible for a trespass done by *his deputy*, by color of his office.³ (a) And trespass is the proper action against the sheriff for an injury done by his deputy to the person or property of another.⁴ But trespass on the case, for any mere *nonfeasance* of the deputy, is held to lie only against the sheriff.⁵ So the sheriff may be liable in trover for an act of his deputy. Thus a sheriff's officer seized goods under a *fi. fa.*, and packed them up. The execution was afterwards abandoned, on an agreement that the plaintiff in the action should receive goods for his demand instead of money. A portion of the goods, however, which

¹ Glover v. Whittenhall, 2 Denio, 633. ⁴ Campbell v. Phelps, 17 Mass. 244, 1 Ib. 530.

² Ibid.

³ State v. Moore, 19 Mis. 369.

⁵ Abbott v. Kimball, 19 Verm. 551.

(a) One specially deputed by a sheriff, though he has not taken the oath of office, is an officer *de facto*. Merrill v. Palmer, 13 N. H. 184.

Where a person acting under a void deputation levied on property, and the property, together with the execution, was returned into the hands of the sheriff, and by him sold; it was held, that the sheriff was protected by such execution, in a suit against him. Crockett v. Latimer, 1 Humph. 272.

A sheriff is liable for his deputy, whether the process was given the deputy by the sheriff or some other person. Matthis v. Pollard, 3 Kelly, 1.

Disputes between deputies of the same sheriff, respecting property attached by them, respectively, should be adjusted by the sheriff; and not by actions between the deputies. Perley v. Foster, 9 Mass. 112.

had been seized, were afterwards sent by the under-sheriff's agent to the sheriff's officer, to hold till the plaintiff should pay him the expenses of the levy. The plaintiff afterwards paid the officer, and the goods were forwarded to the plaintiff. Held, a sufficient conversion, to render the sheriff liable in trover to the assignees of the defendant in the action, who had become bankrupt upon an act of bankruptcy committed before the execution.¹

22. It has been held, that, where a sheriff is liable for his deputy, they cannot be sued jointly.² (See chap. 24.) It is otherwise, however, where the sheriff has expressly ratified the doings of his deputy. Thus, where a deputy levied upon and took property, in the hands of an alleged fraudulent purchaser, and sold enough to pay the execution, leaving a considerable surplus, of which a portion was returned to the purchaser in a damaged state, and another portion was not returned at all; and the sheriff had ratified all the acts of his deputy in the matter; held, they were jointly liable for the goods not returned, and for the injury to the others.³ (a)

¹ Carlisle v. Garland, 7 Bing. 298.

³ Waterbury v. Westervelt, 5 Seld.

² Moulton v. Norton, 5 Barb. 286.

598.

(a) Trespass against the sheriff and S. his bailiff, for breaking the plaintiff's house and taking his goods. Plea by S., justifying under a writ of *feri facias* directed to the sheriff, and a warrant from the sheriff to him. Replication, alleging a prior warrant to J. and a seizure by J. under the writ and warrant, and payment by the plaintiff to the sheriff in satisfaction of the writ. Rejoinder, traversing the prior seizure under the writ and the payment to the sheriff. It appeared that L., the clerk and head officer of J., entered the plaintiff's house and seized his goods under the warrant. The plaintiff paid the amount to L. at J.'s office, and L. withdrew the man in possession, and sent notice to the execution creditor, in J.'s name, that the money was levied. In the course of the same day J. died, and the execution creditor, upon application at the office, did not obtain the money. The sheriff then issued the warrant to S., who seized the plaintiff's goods, and remained in possession for several days. The jury did not agree as to whether L. paid the money to J. before his death, but they found that L. executed the warrant by the direction of J., and that the money was

But, after a judgment in trespass *de bonis asportatis* against a deputy sheriff, and an execution levied on his body, but not satisfied, no action lies against the sheriff¹ And it has been doubted, whether a sheriff and his deputy can be sued jointly for a tort done by the deputy alone.²

23. The sheriff is bound only by *official* acts or defaults of the deputy. Thus the acceptance, by a deputy sheriff, of an order on him, to pay over the proceeds of an execution in his hands for collection; is not an official act, for which the sheriff is responsible.³

24. Nor is the sheriff liable, in consequence of any act of the deputy, recognizing his own liability, in reference to an act for which the law would not hold the deputy responsible. Thus, where the sheriff was not bound by virtue of his office to cause an execution levied by him on land to be recorded in the registry of deeds; and his deputy, having so levied, received the fees for recording of the judgment creditor; the sheriff was held not answerable for the neglect of his deputy to record the execution.⁴

25. A sheriff is not responsible for the act of his deputy, performed while he was the deputy of a former sheriff.⁵ But where a sheriff, on going out of office, becomes the deputy of his successor, the latter is liable for the acts of

¹ Campbell v. Phelps, 1 Pick. 62.

² Ibid.

³ Moore v. Jarrett, 10 Tex. 201.

⁴ Tobey v. Leonard, 15 Mass. 200.

⁵ Wilton, &c. v. Butler, 34 Maine, 431.

received by L. in pursuance of authority from J. The Judge directed the jury that they might find that the money had been paid to the sheriff. The jury found for the plaintiff, damages £400. Held, that there was sufficient evidence of a payment to J. after an execution *de facto* under the prior warrant; and that no irregularity in the execution could be taken advantage of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant; and therefore there was no misdirection. Also, that the damages, though not excessive as against the sheriff, were excessive as against S. Gregory v. Cotterell, 18 Eng. L. & Eq. 99.

the former in respect to process which came to his hands while he was sheriff.¹

26. So a deputy sheriff is bound to keep goods which he *attaches*, to be taken on execution, until thirty days after judgment, whether he remains in office until that time or not; and the sheriff, under whom he acted, is responsible for any omission of such duty. If such sheriff ceases to be in office before judgment is rendered, and the same deputy becomes the deputy of the succeeding sheriff, and the execution is put into such deputy's hands for collection, within the thirty days; he is bound, as deputy of the former sheriff, to have the goods ready to be taken on the execution, without any previous demand.² (a)

¹ *Matthis v. Pollard*, 3 Kelly, 1.

² *Lambard v. Fowler*, 25 Maine, 308.

(a) Where a statute provides that a deputy of a sheriff may continue to act after the death of the sheriff, and a subsequent statute, that in case of such death the coroner shall act as sheriff; the latter act does not repeal the former. *M'Clusky v. M'Neely*, 3 Gilm. 578.

In an action against a sheriff for the default of A., his deputy, the declaration averred, that the plaintiff recovered judgment against M., and took out execution thereon, and delivered it to A.; that goods and real estate were attached on the original writ by F., another deputy, and were held by him to satisfy said execution; yet that A. neglected to levy the execution on the real estate attached, and to seize and sell the goods attached, and to return the execution. The agreed facts in the case were, that the execution was sent to F. after he was out of office, and he delivered it to A. within thirty days after judgment, and informed him that the goods attached were delivered to O., who gave a receipt for them, and redelivered them to M., the debtor, who afterwards sold them; that F. and A. went to O.'s house, and A. demanded of him the goods; that F. then delivered the receipt to A., on the back of which O. had written and signed an acknowledgment, that A. had demanded of him the goods therein mentioned; that A. accepted said receipt, and that O. promised to pay the amount in a short time, but afterwards became insolvent; that A. had no knowledge of the attachment of the real estate within thirty days after judgment; that before the expiration of that time M. had alienated said estate; that no instructions were ever given to F. or A. to levy on real estate or in what manner to collect the execution; and that A. never returned the execution

27. A sheriff may become liable to a *debtor*, as well as a creditor, for the wrongful acts of his deputy. Thus a deputy sheriff was ordered to attach certain real estate, which he did. He afterwards told the debtor, who was ignorant that the writ had been served, that he was going to attach personal property. The debtor asked him if money would not

into the clerk's office, but enclosed it in a letter directed and sent by mail either to the clerk or to the creditor's attorney. Held, that A. was not guilty of any default, for which an action could be maintained against the sheriff, besides that of not returning the execution, for which the sheriff was liable to nominal damages. *Lawrence v. Rice*, 12 Met. 535.

Under the same facts it was held in another case, that F., though out of office, was bound to keep the property safely thirty days after judgment; but that, in order to charge him or the sheriff for his default, it must appear that the property was demanded of him, unless he waived a demand, within thirty days after judgment, by an officer having the authority and charged with the duty of satisfying the execution. Also, that if A., who received the execution from F., was not to be considered as if employed by the plaintiff, then no person was authorized and employed by the plaintiff to serve the execution, and that no legal demand was made on F.; but, if A. was to be considered as if he received the execution from the plaintiff, then he was the plaintiff's agent to demand the property of F. Held, further, that there was, 1st, either no demand by A. on F. for the property; or, if there was, then, 2d, that the delivery of the receipt by F. to A., after a demand on O. by F., or by A. in F.'s presence, rendered O. responsible on his receipt; and that the acceptance of the receipt by A. was an admission by him of a sufficient compliance with such demand, and a waiver of any further performance; and that the action could not be maintained. *Lawrence v. Rice*, 12 Met. 527.

An action on the case lies against an ex-sheriff, for omitting to deliver to the new sheriff a writ of *supersedeas*, by reason of which omission the plaintiff was taken in execution. *Calthrop v. Phillips*, 2 Mod. 217.

One having a right of action against the representative of a deceased sheriff, whose estate is represented insolvent, for the malfeasance of the sheriff or his deputy, must prosecute his claim before the commissioners, and obtain a decree of the Judge of Probate in his favor, in order to entitle him to a remedy upon the bond given by the sheriff, for the faithful performance of the duties of his office, &c.; and he cannot maintain an action at law, except in the cases provided by the laws respecting insolvent estates. *Todd v. Bradford*, 17 Mass. 567.

answer, and he replied that it would, upon which he received of the debtor a sum of money, and made return that he considered it as personal property attached. The deputy having embezzled the money, the sheriff was held responsible to the debtor, who had been compelled to satisfy an execution issued in favor of the creditor.¹

28. In an action against the sheriff for the misfeasance of his deputy, the defendant can give nothing in evidence, which the deputy could not, were he the defendant. Thus he cannot, either by evidence or in pleading, falsify the deputy's return.² And, on the other hand, the letters and confessions of the deputy are held to be competent evidence, and the jury may prefer them to the testimony of witnesses.³ But the return of a person, styling himself deputy-sheriff, is not evidence against the sheriff, without proving him to be a deputy.⁴ And it is said: "The declarations of an undersheriff are evidence against his principal, not for the reason assigned in *Yabsley v. Doble*, 1 Ld. Raym. 190, that as he has given security for the due performance of the duties of his office, his declarations go to charge himself, he being answerable over, and the real party in interest. But his declarations are evidence to charge the sheriff, only where his acts might be given in evidence to charge him; and then rather as acts than as declarations; his declarations being considered as part of the *res gesta*."⁵

29. Not only the deputies of an officer, but other parties whom he employs for his aid, may justify themselves under his authority. (a) Thus, where an officer, who is present at

¹ Knowlton v. Bartlett, 1 Pick. 271.

⁴ Slaughter v. Barnes, 3 Marsh. 418.

² Gardner v. Hosmer, 6 Mass. 325.

⁵ Per Gibson, J., Wheeler v. Ham-

³ Tyler v. Ullmer, 12 Mass. 163; bright, 9 S. & R. 390.

Kempland v. Macauley, Peake, 65.

(a) On the other hand, a person not an officer, but assuming to act as such, may not in all cases incur his liabilities. Thus one who, by false representations that he is qualified to serve civil process, induces another to commit a writ to him for service, is not liable to an action for neglecting to serve it. *Whitney v. Blanchard*, 3 Gray, 208.

the commission of an offence, or on *hue and cry*, is not able to make an arrest, and calls in other officers or the *posse*, their justification is as broad as his own.¹ But no one but the proper officer can execute a search warrant.²

30. Although an officer, in order to *justify himself* alone, must prove a *legal commission and authority*; a third person, claiming under his acts, is required only to show that he assumed to be an officer and acted as such. And, if the officer is joined with him in a suit by a party claiming to be injured, the same privilege is also extended to the officer; more especially where a return has been made upon the process. Thus, where a shop, placed on land of the plaintiff with his permission, was sold on an execution against the owner, and the purchaser entered upon the land and removed the shop; in an action of trespass for such entry against the purchaser and his assistants, including the officer, the defendants may give in evidence the execution and return, without proving that the person levying the execution was an officer *de jure*.³

31. It will be seen hereafter, (a) that a master or principal is responsible for the wrongs committed by his servant or agent. The same principle applies to the party by whom a suit or prosecution is instituted, as liable for the misdoings of an officer, whom he employs to make service of legal process. (b) It is held, more especially, that the party, for whom

¹ *Main v. McCarty*, 15 Ill. 441.

² *Halsted v. Brice*, 13 Mis. 171.

³ *Doty v. Gorham*, 5 Pick. 487;
Duncklee v. Locke, 14 Mass. 525.

(a) See *Master, &c.*

(b) In reference to the form of action, more especially for wrongful criminal prosecutions, it is said: "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other." Per Ashhurst, J., *Morgan v. Hughes*, 2 T. R. 232; acc. *Else v. Smith*, 2 Chit. 808. (See chap. 6.)

Trespass will not lie against a plaintiff in an execution, upon which the

a special deputy executes process, is answerable in trespass, if the deputy had not the authority of the law, but only the direction of the party. So, also, if the party assented to the unnecessary violence of the deputy, however he may have been appointed.¹ And, in general, one who extends the power of a court of special jurisdiction, to a case to which it cannot be lawfully extended, is a trespasser.² Thus, where a warrant is issued from a justice's court, against a person having a family, at the instance of the plaintiff, without the proof required by statute; it is at the peril of the party, and, if the defendant has been arrested, he may have an action of false imprisonment against the plaintiff.³ (See chapters 6 and 8.) So, where B. sued out execution against A., and after seizure and before sale the execution was set aside by rule of Court, of which the sheriff received notice from A. before the sale, and by the terms of which A. was to bring no action for the seizure; the sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from B., held, that A. might sue B. in trespass for the sale.⁴ So A., party in a suit between A. and B., told the clerk that, if certain items of cost taxed by B. should be allowed, an appeal to a judge would be insisted on; and, after the execution was made out, but was yet in the clerk's hands, A. reminded him of the appeal claimed. Held, this was a sufficient entry of the appeal, and, B. having obtained such execution through mistake, and after notice of the appeal having caused A. to be arrested, whereupon A. satisfied the execution; that the execution was void, and that B. was liable to A. in trespass, for the amount paid by A., with interest from the time of payment.⁵ So, where

¹ *Stone v. Chambers*, 1 Strobh. 117.

² *Curry v. Pringle*, 11 Johns. 444.

³ *Ibid.*

⁴ *Perkins v. Plympton*, 7 Bing. 676.

⁵ *Winslow v. Hathaway*, 1 Pick. 211.

defendant's goods were levied and sold, on the ground that the defendant in the judgment was not served with process. *Baird v. Campbell*, 4 W. & S. 191.

property was levied on by a constable, and claimed, and, in a trial before the constable, he found for the claimant, but the creditor directed him, notwithstanding, to sell, and gave him a bond of indemnity; it was held, in trover by the claimant against the creditor, that these facts were evidence, not of title, but as tending to show a trespass by the defendant.¹ So, where permission was given to a party in interest to use the name of another, as the plaintiff in a writ of attachment, in virtue of which the goods of a third person, not the debtor in the action, were attached by the direction of the real plaintiff; and, after the attachment, the nominal plaintiff, upon being inquired of by the agent of the owner of the goods, whether he was the real or the nominal plaintiff, replied, that he was "the plaintiff," and, upon being further asked if he had not better give up the property, replied, "I guess not;" held, a conversion of the goods.² And where the party, in whose favor a legal process issued, directs the acts of the officer done under it, he cannot set up the defence, that the process, and not the direction, influenced the officer; or show that the trespass would have been committed without his interference.³ And, if an execution plaintiff attends the sale of property wrongfully levied on, and becomes himself a purchaser of a part thereof, he so far participates in the sale, as to become jointly liable with the sheriff to an action of trespass.⁴

32. With more particular reference to the wrongful taking of one man's property by virtue of process against another; it is held, that, to maintain either replevin or trespass, it is not necessary to show an actual, forcible dispossession of the plaintiff; but any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain an action. And as a sheriff, by levying on goods and chattels, which are not the property of the execution defendant, is a trespasser; if the

¹ *Matheny v. Johnson*, 9 Mis. 232.

² *Walcott v. Keith*, 2 Fost. 196.

³ *Coats v. Darby*, 2 Comst. 517.

⁴ *Deal v. Bogue*, 20 Penn. 228.

plaintiff in the execution directs the levy to be made, he is a trespasser also. The officer, in such case, is the plaintiff's servant or agent, and trespass or replevin will lie against either of them.¹ And trespass has been said to be the only remedy for damage occasioned to the plaintiff, by the malicious act of the defendant, in causing an execution issued against a third person to be levied on property belonging to the plaintiff.² But trover has also been maintained; though it is not sufficient to maintain trover against the plaintiffs in an execution, that their attorney in the judgment had directed the sale.³

33. A voidable execution, until avoided, is a protection to the party at whose instance it issued and was executed.⁴ So a party is answerable only for the validity of the process and for good faith in suing it out; not for any *irregularity* of the sheriff in executing it, unless committed by his orders.⁵ And, whether a subsequent assent to the trespass will or will not make him a trespasser *ab initio*, such assent must be clear and explicit, and founded on a clear knowledge of the trespass.⁶ Nor is a plaintiff in execution liable, in an action on the case, for a tort committed by the sheriff in executing the writ.⁷ (a) So the person, who assists an officer in making a legal levy, will not become a trespasser, by a subsequent abuse by the officer of his authority.⁸ (b) So, when

¹ *Stewart v. Wells*, 6 Barb. 79; *Lewis v. Jones*, 2 Gale, 211. See *Dameron v. Williams*, 7 Mis. 138.

² *Tatum v. Morris*, 19 Ala. 302; *Hull v. Ames*, 2 Monr. 142; *Libbey v. Soule*, 1 Shepl. 310.

³ *Averill v. Williams*, 4 Denio, 295.

⁴ *Cogburn v. Spence*, 15 Ala. 549.

⁵ *Adams v. Freeman*, 9 Johns. 117.

⁶ *Ibid.*; *West v. Shockley*, 4 Harring. 287; *Kreger v. Osborne*, 7 Blackf. 74. See *Reed v. Markle*, 3 Johns. 523.

⁷ *Princeton, &c. v. Wilson*, 1 Spenc. 138.

⁸ *Wheelock v. Archer*, 26 Verm. 380.

(a) An action on the case will not lie by a landlord, against the plaintiff in execution, or against any other person, for advising, procuring, or commanding a sheriff, to sell and remove the goods of a tenant whose rent is unpaid; such plaintiff or other person knowing that the sheriff had received notice that the rent was due, and intending to prevent the landlord from collecting it. *Princeton, &c. v. Gilson*, 1 Spenc. 138.

(b) If an officer sell property attached by virtue of a statutory provision,

the party does not control or direct the course of an officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser by relation; the party is not affected by it, even when he receives the money coming by such irregularity, although aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it. The expressing of an opinion under protest will not constitute such consent.¹

34. With regard to the amount of damages against an officer, it will be seen to depend upon the nature of the particular default committed by him. (a) In the present connection, however, it may be stated, that, in general, the amount of the judgment is *prima facie* the measure of damages. And proof of actual damage is unnecessary.² But, in case of unintentional default, the officer may prove the real injury

¹ Hyde v. Cooper, 26 Verm. 552.

² Douglass v. Baker, 9 Mis. 41.

without notifying the defendant; in trover, this does not make the attaching creditor jointly liable with him, unless he did something more than request a sale, although he join with the officer in a special plea; if there is also a general several plea. Abbott v. Kimball, 19 Verm. 551.

(a) As in case of delay, till it becomes impossible to execute the process. Douglass v. Baker, 9 Mis. 41.

In an action against a sheriff, for not collecting and returning an execution against the property and body of A., B., and C., running against the property and body of A., and against the property of B. and C.; the defendant may prove, in mitigation of damages, that A. was, during the entire life of the execution, in Canada, and that no one of the debtors had any property, but they were absolutely bankrupt; that there was no bail or attachment, and that the plaintiff had not been damnified. And the plaintiff is only entitled to nominal damages. Ives v. Strong, 19 Verm. 546; acc. Kidder v. Barker, 18 Verm. 454.

In a suit against a sheriff for levying upon and selling goods of the wrong person, evidence, that he applied part of the proceeds of the sale to the discharge of a lien on the goods, is not admissible in mitigation of damages. McMichael v. Mason, 13 Penn. 214.

sustained by the plaintiff. And, on the other hand, in case of wilful wrong, it is said that the plaintiff may recover, in addition to the debt, his incidental expenses and costs not taxable. A sheriff has been permitted to show, in mitigation of damages, the poverty of the debtor, or his continuing liability to arrest.¹ (a)

¹ *Evans v. Manero*, 7 M. & W. 463; 2 Bing. 317; *Young v. Hosmer*, 11 Williams v. Mostyn, 4 M. & W. 145; Mass. 89; *Commonwealth v. Light-Weld v. Bartlett*, 10 Mass. 470; *Brooks* foot, 7 B. Monr. 298. *v. Hoyt*, 6 Pick. 468; *Baker v. Green*,

(a) See chap. 22. A sheriff, by virtue of a *fi. fa.*, seized goods upon lands leased to a tenant, sold them for less than a year's rent, and permitted them to be removed without paying the landlord the year's rent, which was due. The latter brought an action on the case against the sheriff for such removal, and the Court refused, on payment into court of the sum which the goods produced, to stay the proceedings, until the plaintiff undertook to pay the costs of suit, in the event of his not recovering more than the sum paid into court. *Calvert v. Joliffe*, 2 B. & Ad. 418.

CHAPTER XXI.

ATTACHMENT AND EXECUTION.

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| <p>1. Attachment—nature and purpose of an attachment—an <i>alternative</i> remedy.</p> <p>3. Officer's title to, and right of action for, property attached. Title of a <i>receiver</i> or <i>keeper</i>.</p> <p>4. Responsibility for failing to attach, or for property attached.</p> <p>5. <i>Receiver</i> and <i>keeper</i>.</p> <p>10. Right to indemnity.</p> <p>12. Attachment of the property of a third person, or property not subject to attachment.</p> <p>15. Liability of the officer to the defendant in the suit.</p> <p>16. Trespass <i>ab initio</i>.</p> <p>17. Levy of execution upon property attached; duty and liability of the officer.</p> <p>19. Successive attachments.</p> <p>21. Sale, &c., of property attached.</p> <p>24. Rights and liabilities of the sheriff in connection with the acts of his <i>deputy</i>.</p> | <p>25. Effect upon an attachment of the death of parties.</p> <p>27. Property exempt from attachment.</p> <p>28. Damages.</p> <p>30. Rights and liabilities of officers in connection with <i>executions</i>. Suit by a purchaser of property.</p> <p>31. Property exempt from execution.</p> <p>32. Successive acts of a levy may be joined.</p> <p>33. Trespass <i>ab initio</i>.</p> <p>34. Levy upon property of a third person.</p> <p>36. Mode of levy, and instructions relating thereto.</p> <p>37. <i>Return</i> of executions.</p> <p>40. Payment of money collected on execution.</p> <p>45. Title of an officer to property levied on, and right of action therefor.</p> <p>47. Damages.</p> |
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1. In those States where the practice of *attachment upon mesne process* (a) prevails, the rights and liabilities of an

(a) *Attachment* is the actual or constructive taking of property upon a writ, as security for the claim sued upon. But it seems that a return of an attachment of personal property does not conclusively prove a taking, so as to subject the officer to an action of trespass. *Boynton v. Willard*, 10 Pick. 166.

And it has been held that an attachment cannot be made of personal property, though of such kind that it cannot be immediately removed, by a mere indorsement on the writ. The officer must be present and take the property into his possession. *Darling v. Dodge*, 36 Maine, 370.

Where an officer attaches goods, and takes a receipt for the redelivery of them on demand, or payment therefor, and leaves them without removal;

officer are often brought in question, in connection therewith.

he must, in order to preserve the attachment, retain the control thereof himself, or by his servant, or have the power of taking immediate possession. If the possession is abandoned, the attachment is dissolved. *Weston v. Dorr*, 12 Shep. 176.

The nature of the officer's possession and custody depends upon the nature and position of the property, the expense of removal, and the kind of possession retained by the owner; and, in general, it must be such a custody as will enable the officer to assert his control over the property, and so that it cannot probably be withdrawn or taken by another without his knowledge. *Hemminway v. Wheeler*, 14 Pick. 408; *Bicknell v. Trickey*, 34 Maine, 273.

An officer, who was in possession of a room, allowed A. to store personal property there, and afterwards, on a writ against A., attached the property and took exclusive possession of the room, fastened the outer door, but neglected to fasten an inner door leading to a wood-room. Held, a valid attachment. *Slate v. Barker*, 26 Verm. 647.

Where lumber attached was in the mill-yard of another, and the officer removed it from one to four rods, the removal was held sufficient to make an attachment, and to render the officer liable to the debtor for the property, after the creditor's lien was gone. *Fletcher v. Cole*, 26 Verm. 170.

An officer attached a parcel of hewn stones, lying in the town of Worcester, on land belonging to the Commonwealth, by going among and upon them, and directed the creditor, who had receipted for them, and whose place of business was about fifty or sixty rods distant from where the stones lay, and in sight of a part of them, to take charge thereof; but the stones were not removed. No notice was given to any one of the attachment, although there were persons at work or residing near, nor was any other mode adopted of giving notoriety to the transaction. A few days after the attachment, a person was summoned as a trustee in the same writ, and the creditor informed him of the attachment, but desired him not to inform any other person thereof, saying that he did not wish to injure the credit of the debtor. Held, that the attachment was valid, as against a subsequent attachment made without notice thereof, and that sufficient possession was retained to continue it in force. 14 Pick. 408.

If a sheriff, having a writ of attachment, goes to the store of the debtor, whose clerk, in the absence of his master, locks the store and delivers the key to the officer; this is a sufficient attachment of the goods in the store, as against another officer, who afterwards, by the connivance of the debtor, attaches and removes them. *Denney v. Warren*, 16 Mass. 420.

2. Attachment is a proceeding unknown to the common law, but often provided by statute in this country as a con-

So, where an officer enters a store, wherein there are goods belonging to the debtor, declares his intention to attach them, and afterwards locks the store, retaining the key; the attachment is good against an attachment by another officer; he, or the creditor employing him, knowing of the prior attachment. *Gordon v. Jenney*, 16 Mass. 465.

But where an officer had attached certain articles, and afterwards mixed them with other articles of the same kind attached before by another officer, upon a writ against the same person; held, he lost the lien upon those articles which he acquired by his attachment, and the other officer rightfully retained them. *Ibid*.

And an attachment implies that the debtor has ceased to have possession or control of the property; and this notwithstanding any private agreement with the creditor. Thus, where a defendant, whose property had been attached, made an agreement with the plaintiff, that the defendant should take the property, and, if an adjustment of the suit should not be made, should return it, and the plaintiff might then sell or dispose of it as he chose, and apply the proceeds to his claim; and the property was thus delivered and returned, and afterwards sold by the officer upon the writ, the defendant forbidding the sale; it was held, that the defendant had a right to revoke the license to sell. *Wallis v. Truesdell*, 6 Pick. 455.

But the same principle does not apply to a third person in possession of property, under an alleged lien against the debtor. Thus, where goods in the possession of a party who had a lien on them were attached, and he receipted for them to the officer, under an agreement that he should continue to retain for his lien; and afterwards they were attached at his own suit, and he receipted for them, still asserting his lien; it was held that the lien was not discharged. And it was further held, the defendant in the suits not being the owner of the goods, and the general owner having brought replevin against the officer; that, although the attachments were void, and the defendant could not justify as an officer, he might do so as the servant of the party having the lien. *Townsend v. Newall*, 14 Pick. 332.

But where a quantity of hay, cattle, and other personal property was attached, and the officer appointed a keeper, giving him an order of possession in the usual form, and posted up a notice of such attachment on a beam in the barn; and the keeper afterwards went off and abandoned all possession of the property; held, that the lien created by the attachment was thereby lost. *Sanderson v. Edwards*, 16 Pick. 144.

An attachment, in order to be legal and available, must be so *at the time*, and cannot become so afterwards. Thus, if an officer having a writ of at-

current or alternative remedy for the enforcement of a debt or other claim. It is well settled, however, that a plaintiff must *elect* between the two remedies of attachment and arrest—he cannot resort to both. Thus, if an officer attach the estate of a defendant after having arrested him, and return only the attachment, he is liable for a false return to a subsequent attaching creditor.¹

3. An officer, by attaching goods, acquires a special property in them, and trover is a proper action against a wrongdoer who converts them to his own use. And, as in other cases, actual use and exercise of ownership over the property, under a claim of a right of property and right of possession, asserted when the demand was made, is competent evidence of conversion.² So the officer may maintain trespass; even though he have not actual possession. Thus where a deputy sheriff, having attached goods, carried them into Rhode Island, and delivered them to a bailee, taking his receipt, and the bailee put them into the hands of another person for safe keeping; held, the officer might maintain trespass, and recover damages to the value of the goods, against mere strangers who took them away from the keeper in Rhode Island.³ So the receptor of property attached, who has the actual possession of it for safe keeping, may maintain trover against a third person, who takes it out of his possession without color of right.⁴ But where a sheriff, having attached personal chattels, delivers them to a third person for safe keeping, such person is the

¹ Brinley v. Allen, 3 Mass. 561.

⁴ Thayer v. Hutchinson, 13 Verm.

² Lathrop v. Blake, 3 Fost. 46.

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³ Brownell v. Manchester, 1 Pick.

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achment, take possession of the property of the debtor on Saturday evening after sunset, with a view to the immediate operation of the writ upon the property, as an original attachment; he acquires no lien, and the Court will not give effect to it, as an attachment made at the earliest hour on the next Monday morning at which an attachment could lawfully be made, although the officer remain in possession of the property until after that hour. Fifield v. Wooster, 21 Verm. 215.

mere servant of the sheriff, and has no legal interest in the chattels; he cannot therefore maintain trover for them.¹ And, on the other hand, where goods attached by a deputy sheriff are deposited in the hands of a keeper, to be forthcoming on demand; the sheriff has a special property in them, and may maintain an action for them against the keeper, for the benefit of the attaching creditor.² (a) So an officer who has attached personal chattels, and delivered them, upon his accountable receipt, to a third person, who has permitted the owner to retain them, may lawfully take them from the owner, even after he has given him a summons.³ And an action lies for one deputy sheriff who has attached chattels, against another deputy of the same sheriff, who takes them from the bailee of the first deputy, upon another writ against the same party.⁴ And an executor of a deputy sheriff may maintain trover for property attached by the testator.⁵ So, if a debtor assign the property attached to his creditor in satisfaction of his judgment, the officer is still liable over, and will recover the full amount of one who wrongfully takes the property.⁶ But where the plaintiff attached a quantity of starch, which was stored by the debtor in the barn of A., under an agreement that A. should have a lien upon it for the security of a debt, as an officer, by virtue of certain writs against the debtor; and at the time of attachment the plaintiff did not move or take possession of the starch, except by notifying A. that he had attached it; held,

¹ Ludden v. Leavitt, 9 Mass. 104.

² Baker v. Fuller, 21 Pick. 318.

³ Bond v. Padleford, 14 Mass. 394.

⁴ Thompson v. Marsh, 14 Mass. 269.

⁵ Badlam v. Tucker, 1 Pick. 389.

⁶ Fletcher v. Cole, 26 Verm. 170.

(a) In such case, a delivery by the keeper to an adverse claimant is equivalent to conversion. But, if delivered to the debtor's assignees, who had a right to the goods, subject only to the attachment; in an action brought by the sheriff against the keeper after thirty days from the rendition of judgment, the declaration ought to aver a demand upon the keeper, upon the execution, within the thirty days; or else that the keeper had disabled himself from delivering the goods. 21 Pick. 318.

he had not acquired any such property in the starch, as would enable him to maintain trespass therefor, against one who subsequently attached and took possession of it on other writs of attachment.¹ And an attachment of an article, the sale of which is prohibited, gives no right to the officer to maintain an action against a person who takes such article from his possession.²

4. Where a defendant, against whom an attachment has issued, and been placed in the hands of a sheriff for service, has sufficient property to satisfy the plaintiff's demand, the sheriff is liable for any deficiency, if he does not levy on sufficient property.³ (a) And, in an action against a sheriff for failing to serve a process of *garnishment*, (a peculiar kind of attachment,) the judgment recovered against the defendant in the attachment is *prima facie* evidence of the injury sustained, without producing the note on which it was founded.⁴ And where an officer *returns* an attachment, he is liable therefor to the plaintiff in the action, although the attachment was not made by direction of the plaintiff or his attorney; and the plaintiff will be affected by no facts attending the attachment, which do not appear in the return.⁵ So where, by virtue of express statutes, a mere *constructive* taking of property upon a writ, accompanied by certain prescribed formalities, constitutes an available attachment; as where property may be attached by leaving a copy with the town clerk; the sheriff is bound to use ordinary care that it

¹ Blake v. Hatch, 25 Verm. 555.

² Nichols v. Valentine, 36 Maine, 322.

³ Ransom v. Halcott, 18 Barb. 56.

⁴ Kirksey v. Pryor, 13 Ala. 190.

⁵ Franklin, &c. v. Small, 26 Maine.

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(a) Where a sheriff, by virtue of legal process, took into custody a vessel heavily laden with coal, lying near a wharf, and took no precautions to guard the vessel and cargo against the dangers of an impending storm, during which the vessel sunk; held, there was no evidence to warrant the submission to the jury of the question of reasonable care and diligence on the part of the sheriff, but the jury should have been charged that he was liable on the ground of negligence. Moore v. Westervelt, 2 Duer, 59.

be forthcoming to answer the judgment.¹ (a) So a peculiar liability on the part of the officer is involved in the attachment of *live animals*. It is held that he must provide for their support at his peril; that he is answerable to the attaching creditor, and his apprehension of incurring expense in maintaining the cattle will not be an excuse for his not retaining them when attached.²

5. As has been seen, the attaching officer may deliver the property attached to some third person, who agrees to restore it on demand; commonly called a *receiptor*. (b) Questions have arisen as to the relative rights and liabilities of the officer and receiptor in reference to the title of the property. Thus a receipt, after enumerating certain goods, said, "the property of, &c., (the debtor) attached on a writ, &c., all which I promise to redeliver on demand." The goods were redelivered accordingly to the officer, and the receiptor immediately afterwards replevied them as his own property. Held, he was not estopped by his receipt, nor by the redelivery of the goods, to deny that they were the property of the debtor.³ (c) But, where a receipt declares that "this receipt

¹ Smith v. Church, 1 Williams, 168.

² Johns v. Church, 12 Pick. 557.

³ Sewall v. Mattoon, 9 Mass. 535.

(a) But in Massachusetts, after the revised statutes went into operation, and before the passing of Stat. 1838, c. 186, an officer was directed to "attach specially," without directions as to the property to be attached. He thereupon attached sufficient real estate; but the attachment was lost in consequence of an omission to deposit a copy of the writ, &c., in the clerk's office within three days. Held, the officer was not answerable to the creditor, although there was sufficient personal property which might have been attached. Goodnow v. Willard, 5 Met. 517.

And in an action against an officer for not attaching goods, he may prove, by the admissions of the plaintiff, that an arrangement had been made, by which he was to levy his execution upon real estate, yielding the personal property to other creditors. Weld v. Chadbourne, 37 Maine, 221.

(b) Differing from a mere *keeper*, who is strictly a servant of the officer, undertaking to keep the property for him; whereas a receiptor ordinarily interposes on the application and for the benefit of the debtor.

(c) It is held that an officer may deliver property attached to the creditor

shall be conclusive evidence against me, as to the receipt of said property, its value, and my liability, under all circumstances, to said officer;" the receiptor is estopped to deny that it was the property of the debtor; and the officer, therefore, cannot set up, as a defence to an action against him by the creditor for refusing to deliver the property attached, to be taken on execution, that it did not belong to the creditor, but to the receiptor.¹

6. If goods attached upon a writ against a third person are delivered to the owner, upon his written receipt and promise to redeliver them to the officer on demand, the owner may nevertheless maintain trespass against the officer; although,

¹ *Penobscot, &c. v. Wilkins*, 27 Maine, 345.

for safe keeping, and take its value in money as security during the pendency of the suit, and the debtor cannot complain. *Gassett v. Sargeant*, 26 Verm. 424. See *Browning v. Hanford*, 5 Denio, 586; *The State v. Nelson*, 1 Cart. 522.

An officer delivered attached chattels to a bailee, but neglected to demand them on execution until after his lien had ceased, and the bailee refused to deliver them; whereupon he sued the bailee, and, pending the action, the attaching creditor agreed to indemnify him against all costs on account thereof. It not appearing that such suit was prosecuted at the attaching creditor's request, the agreement was held to be without consideration. *Balcom v. Craggin*, 5 Pick. 295.

A receiptor becomes liable to the officer, if he does not deliver the property on demand. The contract is so strictly construed, that a receiptor for horses and hay, who contracts to deliver the same "free from damage or expense," is not entitled even to use any of the hay for the sustenance of the horses. And parol evidence is not admissible in an action against a receiptor, to show that "100 bushels of rye, valued at \$100," were in fact 100 bushels of rye unthreshed. Nor can a receiptor justify by showing that the property was mortgaged, if the mortgagee has made no demand upon him for the property. And an offer to receive it, upon terms which are not complied with, is not a waiver of a previous demand. *Scott v. Whittemore*, 7 Fost. 309.

Another officer, on making demand upon a receiptor for property attached, must state by what authority he makes it. If his right to claim the property is not questioned, the authority distinctly claimed will be deemed to be admitted. *Phelps v. Gilchrist*, 8 Fost. 266.

in an action by the officer upon such receipt, the owner of the goods would be estopped to set up property in himself. The measure of damages is the value of the goods at the time of attachment, but without interest for the time during which the owner had the use of them under the receipt.¹ So the defendant, claiming a wagon as his own, took it out of the possession of the plaintiff, and held it about ten days, when the plaintiff attached it, as the property of the defendant, and the officer delivered it for safe keeping to the plaintiff's hired man, who placed it under the plaintiff's shed. The plaintiff thereupon brought trespass against the defendant, for the original taking of the wagon; and it was held, that the wagon was not to be deemed, as matter of law, to have been returned to the plaintiff, by virtue of its having been so attached by him, and placed under his shed; that the plaintiff was not thereby estopped from claiming that he had title to the wagon, when it was taken by the defendant; that the rule of damages was the value of the property, with interest from the time of conversion; but, as this did not appear, interest was not to be included; and that further damages for detention of the property were not allowable.²

7. The approval, by a plaintiff, of the person taken as receiptor, does not exonerate the officer from making effort to find the property, that it may be sold on execution, or of bringing a suit upon the receipt.³ And a sheriff who attaches personal property, and leaves it in the possession of a receiptor, by whom it is delivered to the owner, who converts it to his own use; is estopped by his return of such attachment, when called upon to seize and sell the property on the execution, to deny that the property is in his hands, both as against the original attaching creditor, and as against the assignee of the debtor in insolvency, admitted to prosecute the suit under the provisions of an insolvent law.⁴

8. When the receipt promises that the property shall be

¹ *Robinson v. Mansfield*, 13 Pick. 139.

² *Allen v. Doyle*, 33 Maine, 420.

³ *Bacon v. Lincoln*, 2 Cush. 124.

⁴ *Lewis v. Morse*, 20 Conn. 211.

delivered "on demand;" a demand is necessary, previous to commencing a suit on the receipt, notwithstanding the inability of the receiptor to redeliver the property.¹ But, after demand, trover will lie against a receiptor,² either by the sheriff, to whom the receipt is given, or in his name, for the benefit of those whose rights are to be affected. And where the receiptor has mortgaged it to pay his own debts, a demand and refusal are not necessary, in order to sustain trover. The conveyance of the property is a conversion.³ So where two receipt for property, and one of them converts it with the knowledge of the other, who does not interfere to prevent the conversion; a subsequent demand upon the latter, and a non-compliance with the demand, are competent evidence of a joint conversion.⁴ So the receiptor's written acknowledgment, upon the receipt, of a demand upon him, at a certain date, is sufficient evidence.⁵ (a)

9. A receiptor, under some circumstances, may doubtless be liable to the debtor, as well as the officer or creditor. But where a receiptor, in a suit in one State, having taken the property to his residence in a neighboring State, there pointed it out to an officer, and permitted it to be attached, and taken from him, on a writ sued out by the plaintiff in the first action, returnable to the courts of that State; held,

¹ *Bicknell v. Hill*, 33 Maine, 297.
See *Phelps v. Gilchrist*, 8 Fost. 266.

² *Webb v. Steele*, 13 N. H. 230.

³ *Stevens v. Eames*, 2 Fost. 568; 13 N. H. 230; 10 Ib. 199.

⁴ *Ibid.*

⁵ *Cargill v. Webb*, 10 N. H. 199.

(a) As a creditor of two joint debtors has a right to secure his claim by attaching the property of both or either of them; where A., in a suit against B. and C., directed the officer to attach the property of B., and not of C., which he did; and afterwards the officer put the property into the hands of D., and took from him a receipt, promising to redeliver such property on demand, without informing D. of the direction given by A. in relation to the attachment; in an action brought by the officer, on such receipt, against D., it was held, that such attachment was no violation of the rights of B. or C., and that the want of such information to D. was not a constructive fraud. *Marion v. Faxon*, 20 Conn. 486.

the receiptor was not liable in trover to the defendant, on the plaintiff's abandoning the suit in this State.¹

10. In respect to the rights and liabilities of an officer, connected with the seizure, either upon attachment or execution, of property the title to which is doubtful, and more particularly which is not in the possession of the debtor; it has been held, that if a sheriff, upon the representation of the creditor, seized goods as belonging to the debtor, and damages are recovered against the sheriff by a third person, claiming the goods; an action upon the case lies, at the suit of the sheriff, against the creditor, although there were no fraud in the representation, or knowledge of its falsehood.² (a)

11. But, on the other hand, it is held, that the law will not imply an indemnity to the officer, if he attach property not in possession of the debtor without special orders; and therefore he is not bound to attach such property, unless specially requested by the creditor or his attorney.³ Nor is a sheriff liable, for failing or refusing to levy on, or after levy to sell, disputed property, unless he is indemnified. And his return as to the facts is evidence for him, to be considered

¹ Chase v. Andrews, 6 Cush. 114.

³ Weld v. Chadbourne, 37 Maine,

² Humphreys v. Pratt, 5 Bligh, N. R. 221.
154.

(a) Where a sheriff levies on property, with notice of an adverse claim, under a promise by the plaintiff to indemnify him before the sale; the sheriff is liable for the property, if it belonged to the execution defendant, although the plaintiff has not indemnified him, where no demand of indemnity has been made. Miller v. Commonwealth, 5 Barr, 294.

A laborer, who had a lien for helping to drive the logs of several owners intermingled together, in order to enforce his lien, attached a part of them, and seasonably delivered the execution to the officer, who refused to sell them. Held, as the officer did not show that he would have been required to take the property of one person to pay the debt of another, or to do any unlawful act, he was liable for such refusal. Doyle v. True, 36 Maine, 542.

A sheriff is bound to levy a mortgage *fi. fa.* on the mortgage property described in the process, even though in the possession of a third person, holding adversely to the mortgagor. Wallace v. Holley, 13 Geo. 389.

by the jury with the other evidence in the cause. Nor is it necessary that he should notify the plaintiff or demand indemnity.¹ So, where a sheriff has reason to doubt whether goods are the property of a debtor, he may insist on the creditor's showing them to him, and also on being indemnified for attaching or levying upon them. But if, without making any such claim, he undertakes to execute the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power to do so.²

12. A precept against one person, as has been seen, (pp. 344, 368,) does not justify the officer in attaching the goods of another. Thus the wrongful attachment of goods in the hands of a bailee, and taking from him a forthcoming bond for their delivery, is such a conversion, as will support an action of trover by the owner against the sheriff.³ But, if the goods of a stranger are in the possession of a debtor, and so mixed with those of the debtor, that the officer on due inquiry cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice, and a demand of his goods, and a refusal or delay of the officer to redeliver them.⁴

13. In trespass against an officer, for attaching property of the plaintiff, in an action against him which was not sustained; he is not estopped to show that the property belonged to him, although at the time of the attachment he declared it belonged to a stranger; the plaintiff having acquired no advantage, and the officer having sustained no damage, by such declaration.⁵ And, on the other hand, in an action of trespass against an officer, for taking and carrying away goods, which he has attached and claims to hold as the property of the plaintiff; the officer is not estopped to deny the property of the plaintiff.⁶

14. The liability of the officer, for failing to make an

¹ State v. Sharp, 2 Sneed, 615.

² Bond v. Ward, 7 Mass. 123.

³ Abercrombie v. Bradford, 16 Ala. 560. See Simpson v. Watrus, 3 Hill, 619.

⁴ Bond v. Ward, 7 Mass. 123.

⁵ Wallis v. Truesdell, 6 Pick. 255.

⁶ Robert v. Wentworth, 5 Cuth. 192.

attachment, involves a corresponding power to do whatever may be necessary for the execution of this precept. Thus if a person, having in his store the goods of the defendant named in a writ, refuses to permit an officer to enter the store for the purpose of attaching the goods, the officer is justified in breaking it open for such purpose.¹ (a) And if the goods of a debtor are secreted in the store or warehouse of a third person, the officer may, even in the night, break open the outer door for the purpose of seizing them, after an unsuccessful demand of admittance upon one having the key, however he may have come in possession of it.² But when boxes at a depot for transportation contain attachable articles, the officer is not authorized to remove the boxes from the depot, unnecessarily, for the purpose of attachment; though he may take possession of, and open the same, and attach any property liable therein.³ So, if an officer would take goods belonging to A. and in A.'s possession, upon a writ against B., A. may maintain his possession by force, in the same manner as he might against any other trespasser.⁴ And if an officer attaches property not liable to attachment, he is a trespasser;⁵ and an action of trespass lies against him.⁶ So, in an action against an officer, for attaching the property of the plaintiff in a suit against another person, the defendant cannot justify under the writ without showing, that, if then returnable, it has been duly returned.⁷ (b)

¹ Platt v. Brown, 16 Pick. 553.

⁵ Fort v. Stewart, 2 Shep. 312.

² Burton v. Wilkinson, 18 Verm. 186.

⁶ Bean v. Hubbard, 4 Cush. 85.

³ Peeler v. Stebbins, 26 Verm. 644.

⁷ Russ v. Butterfield, 6 Cush. 242.

⁴ Commonwealth v. Kennard, 8 Pick.

133.

(a) The assistants of a sheriff's officer, for the purpose of executing a *fi. fa.*, illegally entered the plaintiff's premises on Sunday, by breaking open a window, but, by the officer's direction, abandoned possession on the Monday following. On the Thursday after, the officer himself entered the same premises to execute a distress warrant, and seized goods. Held, he might sell the goods. *Percival v. Stamp*, 24 Eng. L. & Eq. 899.

(b) This is the proper form of action at common law; but since the statute of Massachusetts, 1839, ch. 151, § 4, providing that "in all actions

15. An attachment does not change the ownership of property. The officer is the agent of both parties, and may be liable to either. (a) But if the property is lost, without the neglect of the officer or the plaintiff, the loss must be sustained by the defendant, who has failed to pay the amount due. A plea, therefore, that property was *attached and lost*, is defective, in not showing how the loss occurred.¹ And where final judgment is rendered in favor of the defendant, trover will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property.² Nor, as between the owner of goods and an officer, will replevin lie for property in the hands of the latter by virtue of an attachment, unless exempted from execution or attachment.³ And, in order to sustain an action for an *excessive* attachment, the allegation and proof must be substantially the same as in a suit for a malicious action, that is, want of probable cause and express malice; and the attaching creditor will ordinarily be the only person liable to such action. And, on the other hand, the general rule is laid down, that an attaching creditor can in no case be held jointly liable with the officer for any wrong committed by the officer, unless he in some way participated in the wrong, or ratified and confirmed it, after becoming aware of it.⁴ (b)

¹ *Star v. Moore*, 3 McLean, 354; acc. *Conway v. Nolte*, 11 Mis. 74.

² *Keyser v. Waterbury*, 7 Barb. 650.

³ *Abbott v. Kimball*, 19 Verm. 551.

⁴ *Abbott v. Kimball*, 19 Verm. 551.

on the case it shall be no objection to maintaining such actions that but for this act the form thereof should have been trespass;" trover will equally well lie. *Davlin v. Stone*, 4 Cush. 359.

(a) An officer, holding a process against several *joint* parties, is not bound to regard the equities subsisting among the debtors, nor can he be subjected to a suit in favor of a coobligor or surety, for any default in enforcing an execution against the principal debtor. *Rutland v. Paige*, 24 Verm. 181.

(b) A sheriff who makes an excessive attachment of property, then sells on execution more than is sufficient to satisfy the judgment, returns a small part of the property to the parties claiming it, but in very damaged condition, and retains in his hands the surplus of the proceeds of the sale

16. We have already had occasion (i. 114) to consider the general doctrine of *trespass ab initio*, (a) whereby the subsequent abuse of an authority conferred by law subjects a party to an action for an act originally justifiable. Upon this principle, if, on attachment of goods, the officer continue in possession of the defendant's house, or keep the goods therein, for a long and unreasonable time, instead of removing them to a place of safe custody; he is a trespasser *ab initio*.¹ (b) So an officer, who enters a house by authority

¹ Reed v. Harrison, 2 W. Black. 1219.

on execution; is liable for the surplus and for the damage in an action brought by a purchaser of the property, prior to the attachment, whose title is in fraud of creditors and void as to them. *Waterbury v. Westervelt*, 5 Seld. 598.

B., as constable, attached the joint property of A. and S., on writs against both. The property was appraised without notice to A., and S. deposited with B. the appraised value, and received the property. The suit resulted in A.'s favor, and, after demanding the property of B., A. brought trover for it. Held, that this was not equivalent to a public sale of the whole property; nor was B. guilty of a conversion; and that a delivery to S. was to all intents a delivery to A. *Gassett v. Sargent*, 26 Verm. 424.

Replevin will not lie against an officer, who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to redeliver the goods. *Gardner v. Campbell*, 15 Johns. 401.

(a) "The general rule is in the *Six Carpenters' case* (8 Co. 146 a), where there is an authority given by law for doing an act, there an abuse may turn the act into a trespass *ab initio*. The rule is said to rest upon this—that the subsequent illegality shows the party to have contemplated an illegality all along, so that the whole becomes a trespass." Per Littledale, J., *Smith v. Egginton*, 7 Ad. & Ell. 176; 6 Dowl. P. C. 38.

(b) So it is held in Massachusetts, in virtue of certain statutory provisions, that a mortgagee or pawnee of goods in a store, who has taken possession of the store and goods, with the consent of the mortgagor or pawnor, cannot maintain an action of trespass against an officer, for entering the store for the purpose of attaching the goods, at the suit of a creditor of the mortgagor or pawnor, unless the officer keeps possession of the store for an unreasonable length of time, so as to make himself a trespasser *ab initio*. *Rowley v. Rice*, 11 Met. 337.

of law, and attaches goods therein, becomes a trespasser *ab initio*, by placing there an unfit person, as keeper of the goods, against the remonstrance of the owner of the house.¹ So where an officer sells property attached, without pursuing the provisions of the statute on that subject, and the defendant prevails in the suit, the officer becomes a trespasser *ab initio*, and is liable to an immediate action, without any previous demand on him for the chattels.² And though the suit on which the property is attached is still pending.³ But where property attached is sold by the officer, upon the writ, in pursuance of a statute, and judgment is finally rendered in favor of the defendant, a refusal, on the part of the officer, to pay to the defendant the amount for which the property was sold, will not make him a trespasser *ab initio*, so as to render him liable in trover. The only proper action against the sheriff, in such case, is for money; and in that action the attaching creditor cannot be joined, unless he has been jointly concerned in the detainer.⁴ Nor can an officer be made a trespasser for attaching property, by any irregularity in the proceedings of another officer in selling the property upon execution.⁵ So an officer cannot be held liable, as a trespasser *ab initio*, for using personal property attached by him, unless the property have been injured, or used by him for his own benefit, or for the benefit of some one other than the debtor. As where an officer attached a horse, wagon, and harness, and immediately put them to use in removing other personal property of the debtor, attached by him at the same time, and they were not thereby injured.⁶ So where the officer, on the next day subsequent to the attachment, was seen driving the horse and wagon in the highway, but it did not appear for what purpose; the jury may infer, from the time and circumstances, that he was removing them, for the purpose of securing them in a convenient place for keeping them while subject to the attachment.⁷

¹ Malcom v. Spoor, 12 Met. 279.

² Wallis v. Truesdell, 6 Pick. 455.

³ Ross v. Philbrick, 39 Maine, 29.

⁴ Abbott v. Kimball, 19 Vern. 551.

⁵ Paul v. Slason, 22 Vern. 231.

⁶ Ibid.

⁷ Ibid.

17. It is in general provided by express statute, that the lien of an attachment shall cease, unless, within a certain time after judgment in the suit, execution be levied upon the property. With reference to this statutory requirement, a deputy sheriff, in Maine, who has attached personal property, is bound to keep it thirty days after judgment, and to deliver it to the officer holding the execution at the expiration of that time, on demand, though in the mean time he has ceased to be a deputy.¹ (a) So a sheriff, who has attached property by leaving a copy with the town clerk, is bound to use ordinary care to see that it is forthcoming to answer the judgment.² But an attachment is not conclusive of the officer's obligation to levy an execution upon the property. Thus an officer, directed to "attach property or make no service," attached certain property, which was alleged in the return to belong to the debtor. In an action against him for not seizing it on execution, he may prove in defence that it was not the property of the debtor.³ Though the discharge of the execution, during the pendency of an action against a sheriff for not properly keeping property attached is merely in mitigation, and nominal damages may be recovered.⁴ And the officer, being responsible for the goods attached as well to the debtor as to the creditor, is not bound to deliver them to the latter, who has taken out execution, so that he may procure his execution to be levied upon them.⁵ And it is

¹ *Smith v. Bodfish*, 39 Maine, 136.

⁴ *Brown v. Richmond*, 1 Williams,

² *Smith v. Church*, 1 Williams, 168. 583.

³ *Canada v. Southwick*, 16 Pick. 556.

⁵ *Blake v. Shaw*, 7 Mass. 505.

(a) The distinction is adopted in Massachusetts, that, where an *equity of redemption* is attached, it is the duty of the officer, upon receiving the execution within thirty days after judgment, to levy on the equity without particular instructions; but that it is otherwise where the land itself is attached. And where "all the right, title, and interest" of the debtor, in land which proved to be under mortgage, was attached; it was held that the officer, having no instructions to levy on the equity, was not liable for neglecting to do so, unless he knew that he had attached an equity only. *Start v. Sherwin*, 1 Pick. 521.

not the duty of the sheriff, who has attached property, to take out execution after judgment; and if, in such case, the plaintiff neglects to take out execution within a reasonable time, neither the sheriff, nor his sureties, will be liable for the forthcoming of the property attached.¹ So, although the goods attached were delivered to a keeper, upon his accountable receipt, and by him restored to the debtor, and afterwards demanded of the officer upon execution, but not within thirty days from judgment; the officer is not liable for not delivering them. But, where the goods so attached were tools of trade, and the debtor brought an action of trespass against the officer for attaching them, and recovered judgment for their value; and the plaintiff, having agreed to indemnify the officer, defended the action and satisfied the judgment; it was held that the officer was liable to the plaintiff for the goods, for by the judgment and satisfaction the property became vested in the plaintiff.²

18. Where an officer attaches property, and within thirty days after judgment receives the execution, but neglects to seize and sell such property; and, before the return day of the execution, the debtor dies insolvent, and the officer returns the execution unsatisfied; he is liable to the creditor for his neglect.³ But an officer, who delivers property, held by him under attachment, to an assignee in insolvency of the debtor, upon demand made while the assignment is in force, is not liable therefor to the attaching creditor, in case the proceedings in insolvency are subsequently annulled, for want of notice to the debtor of the petition by which they were instituted.⁴ (a)

¹ Snell v. Allen, 1 Swan, 208.

² Howard v. Smith, 12 Pick. 202.

³ Barnard v. Ward, 9 Mass. 269.

⁴ Penniman v. Freeman, 3 Gray, 245.

(a) Where an officer has attached goods, and within thirty days after judgment seized them in execution, but failed to sell them; another officer may lawfully seize them, on another execution, in the hands of the bailee of the first officer, notwithstanding he had notice of the first seizure. Warren v. Leland, 9 Mass. 265.

19. The same property may be successively attached by different creditors, (a) any one of whom may maintain an action against the sheriff for an injury occasioned by his default in relation to the property. (b) But, in order to sup-

(a) In reference to property taken on successive *executions*, where the sheriff is sued for selling the same personal property a second time, on a different execution, he is not estopped from giving evidence of fraud on the first sale. The sheriff, in making a sale, is but the instrument of the law; and the execution creditor, who had the property sold the second time, has a right to show that the first sale was collusive. *McMichael v. McDermott*, 17 Penn. 353.

(b) See *Pailkes v. Thielen*, 1 La. An. 34. A wrongful act of the officer may also avoid a prior writ as against a subsequent attachment. Thus, where a deputy sheriff, having in his hands a writ of attachment, by direction of the creditor's attorney, but not in his presence, alters the date and return day of the writ, and attaches upon it property of the debtor; the writ is void as against a subsequent attaching creditor. *Clarke v. Lyman*, 10 Pick. 45.

If an officer attaches personal property, and it is subsequently taken from his possession by another officer, having another writ of attachment against the same debtor, and the property is sold, and its avails applied by the second officer upon the execution obtained in the second suit; judgment can be obtained for no more than nominal damages, in a suit brought in the name of the first officer against the second officer for such taking, if the first attaching creditor have neglected to take out execution within sixty days after final judgment in his suit. Nor can the plaintiff recover, upon the ground of any liability, on his part, to the debtor; since the act of the second attaching officer, in taking the property, was justifiable, so far as the debtor was concerned; and the debtor may have an action upon the case, in his own name, for any injury to the property itself, notwithstanding the special property and exclusive possession in the first officer might prevent the debtor from bringing trespass. Neither is the first officer, in such case, entitled to recover actual damages, to the time when the lien was abandoned, for the purpose of indemnifying him against the expenses, to that time, of the action of trespass; since it is very unusual, in any case, to give damages beyond the actual value of the property, as against a second attaching officer, and the second attaching officer may require indemnity, if he please, before making the attachment; and, in such case, the costs recovered are the taxable costs, and not those between attorney and client, as allowed in some other cases of indemnity. *Goodrich v. Church*, 20 Verm. 187.

port an action, the plaintiff must show that he has suffered *directly* from the act complained of. Thus the first of several attaching creditors obtained a judgment, in which were included illegal fees charged by the sheriff, to such amount, that the property attached was not sufficient to satisfy the executions, which issued on attachments prior to the plaintiff's, and his own also. The plaintiff brought an action on the case against the sheriff, to recover the amount of the illegal fees. Held, he could not recover.¹ But one creditor may maintain an action against the officer for a false return upon the writ of another, by which he is injured. Thus, where an officer, having attached an equity of redemption, sells it on execution without having given notice of the *place* of sale, but falsely returns that he has given such notice, in consequence of which return a subsequent attaching creditor, being unable to sell the equity of redemption, is prevented from obtaining satisfaction of his demand; the officer is liable to such creditor in an action for the false return; and the measure of damages is the debt and in-

¹ Turner v. Norris, 35 Maine, 112.

Where the goods of one are attached and taken by the officer on a writ against another, and afterwards again attached and taken in the same manner on a writ in favor of a different creditor; a release by the owner of all claim to damages, in consequence of the second attachment, on consideration of its relinquishment, has no effect upon a suit to recover damages occasioned by the first taking. *Weston v. Dorr*, 12 Shep. 176.

Where two officers at nearly the same instant took possession of property, each claiming to have attached it, and a contract was made between them to settle this dispute by a division of the property; it was held, that the contract was upon good consideration, and binding upon them, however it might be upon the creditors. Also, that such agreement (that each should have a moiety of the goods) would preclude them from afterwards raising the question of priority. And, though they in fact became tenants in common of the goods, as between themselves, yet, if one seized and sold the whole of the goods on his executions, (both sets of creditors having taken the necessary measures to charge the goods in execution,) the other officer can sustain trover, without showing that he in fact made the first attachment. *Lyman v. Dow*, 25 Verm. 405.

terest, if the value of the property attached amounts to so much.¹

20. If an officer, having attached goods of a debtor, suffers them to remain intermingled with other goods of the debtor, and makes claim to the whole, so that another officer, having a writ against the same debtor, cannot distinguish which have been attached; the latter officer may attach the whole.²

21. Where a sheriff, to whom a writ of attachment is delivered, has directions from the creditor to attach certain chattels of the debtor, he is not bound to attach, on the same writ, other property, afterwards shown him by another creditor, with directions to attach the same on his suit.³

22. If A.'s personal property is attached in a suit against B., and A. sells and assigns his property to C. while it is under attachment, an action of trespass, for the benefit of C. against the attaching officer, is properly brought in the name of A.⁴

23. Where goods under attachment are assigned by the owner, and then again attached by the same officer, the delivery of the instrument of assignment is a sufficient delivery of the goods; and the assignee, having paid the claim of the first attaching creditor, may, upon giving the officer notice of such payment, and of the assignment, and demanding possession of the goods, maintain replevin therefor against him.⁵

24. The liability of a sheriff, for the doings of his *deputy* (see p. 360) in relation to an attachment, is limited to the acts of the deputy done while the relation between them continues. Thus, where the deputy of a former sheriff had attached goods, and afterwards—being the deputy of the present sheriff—refused to serve the execution upon them, the former sheriff was held not liable.⁶ But where a deputy sheriff, who had attached personal property, ceased to be a deputy before judgment, but the execution was put into his hands

¹ *Whitaker v. Sumner*, 9 Pick. 308.

² *Sawyer v. Merrill*, 6 Pick. 478.

³ *Goddard v. Austin*, 15 Mass. 133.

⁴ *Holly v. Huggefords*, 8 Pick. 73.

⁵ *Whipple v. Thayer*, 16 Pick. 25.

⁶ *Blake v. Shaw*, 7 Mass. 505.

as coroner, with orders to satisfy it from the property attached; the coroner having neglected to make this application of the property, it was held, in an action against the sheriff for such neglect, that his return as coroner on the execution, so far as it related to a demand of the property, was admissible in evidence.¹ And the sheriff may be answerable upon a *contract* of the deputy in relation to property attached. Thus a deputy sheriff, having attached goods in a suit brought by F. against M., sold them on mesne process, pursuant to statute, and held the proceeds. M. died, and his administratrix, and F., and A., a creditor of F., executed an indenture, in which it was agreed that the deputy should pay (and he was therein directed and requested to pay) part of said proceeds to M.'s administratrix, and the residue to A., and that F.'s suit against M. should be dismissed. The deputy paid M.'s administratrix accordingly, and made part payment to A., and the suit was dismissed; but he neglected to pay A. in full. M.'s administratrix thereupon sued the sheriff, for the deputy's default in not paying over the balance of the proceeds. Held, that the sheriff was answerable to her for this default of the deputy.² So where a debtor and his attaching creditors agree in writing, that the goods may be sold by the deputy sheriff who attached them, either at public or private sale, at his discretion, and the proceeds held to respond the judgments, and the deputy sells the goods, partly at private and partly at public sale, and receives the money therefor, but neglects to apply it in satisfaction of executions issued on the judgments, and seasonably put into his hands; the sheriff is answerable.³

25. A statute, which provides, that "actions of trespass and trespass on the case for damages done to real or personal estate" shall survive; applies to an action of trespass on the case against a sheriff, for the fault of his deputy in

¹ Smith v. Bodfish, 39 Maine, 136.

² Mansfield v. Sumner, 6 Met. 94.

³ New Hamp. Savings' Bank v. Var-
num, 1 Met. 34.

not keeping property attached, and not delivering it to the officer holding the execution.¹

26. After an attachment of goods, and pending the action, the defendant died; his administrator took upon him the defence of the action; judgment was rendered against the administrator, and execution thereon delivered to the officer, who delivered up the goods to the administrator. The latter included them in his inventory; and, on settling his account of administration, the Judge assigned to the widow all the effects that remained after paying funeral charges, &c. No representation of insolvency was made. Held, the officer was liable to the judgment creditor for the value of the goods attached.²

27. In regard to the seizure, either by attachment or upon execution, of property specially exempted from such liability; (a) it is held, that trover in common form will lie against a constable, for the seizure and sale by execution of chattels exempt from execution; and the plaintiff need only allege a right of property and possession, without a special allegation of the facts which must appear to entitle him to recover.³ But trespass cannot be maintained against an officer, for selling property on execution by virtue of an

¹ *Dana v. Lull*, 21 Verm. 383.

² *Hawkins v. Pearce*, 11 Humph. 44.

³ *Rockwood v. Allen*, 7 Mass. 254.

(a) Where charcoal in the pit was attached, a part of which was entirely completed, so as not to require any further attention or labor, and the residue of which had so far progressed in the process of manufacture as to have been entirely burnt to coal, although some labor and skill were still necessary in order to separate and preserve it properly; it was held, that if a sheriff, holding a writ of attachment against the owner, saw fit to attach and take possession of the coal, and run the risk of being able to keep it properly, he had the right to do so. Also, that if any portion of the coal so attached were consumed through the want of proper care and attention on the part of the officer, the plaintiff could not sustain trespass against the officer to recover for such nonfeasance, and that the attaching creditor was not liable therefor, unless the omission were by his command or assent. *Hale v. Huntley*, 21 Verm. 147. See *Wilds v. Blanchard*, 7 Ib. 138.

attachment, on the ground that the property was exempt from attachment and seizure, without showing that it was exempt at the time of the attachment.¹ So where, in a foreign attachment, a person disclosed that he had in his hands certain specified articles belonging to the principal defendant, and was thereupon adjudged trustee, and an execution was issued against the effects of the principal in the hands of the trustee, and levied on these articles; held, that an action of trespass against the officer, on the ground that the articles were by law exempted from attachment and execution, would not lie.²

28. With regard to the amount of *damages* to be recovered against an officer on account of his default in relation to an attachment; in an action for neglecting to keep goods attached so that they might have been taken in execution, although the officer has neglected his official duty, yet if, in case he had adhered to it, the plaintiffs would have derived no benefit from their attachment, they are entitled to nominal damages only.³

29. The discharge of the execution, pending an action against a sheriff for not properly keeping property attached, is merely *in mitigation*, and nominal damages may be recovered.⁴

30. The rights and liabilities of an officer are more generally brought in question in connection with the *execution*, which, unlike attachment, is a common-law process, than in any other form. Thus, in addition to the ordinary liability of an officer to the parties to the suit, it is held, that, if the purchaser at a sale on execution loses his title to the property, in consequence of a neglect of the officer to comply with the requisitions of the law, he has a remedy by an action on the case against the officer. And, in such case, the sheriff is answerable for the default of his deputy.⁵

31. As in case of attachment, trover will lie against an

¹ Greaton v. Pike, 34 Maine, 233.

² Haskell v. Sumner, 1 Pick. 459.

³ Rich v. Bell, 16 Mass. 294.

⁴ Brown v. Richmond, 1 Williams, 583.

⁵ Sexton v. Nevers, 20 Pick. 451.

officer, who takes, upon an execution, property exempted by law from attachment.¹ But where certain articles, to be selected by the owner, are exempted from execution, and an officer seizes and sells them, trespass will not lie against him, unless at the time of the levy, or within a reasonable time thereafter, the plaintiff selected the property and notified the officer thereof.² (a)

32. The levy, carrying away, and sale of a plaintiff's goods, although taking place upon different days, constitute but one act of trespass, and the plaintiff cannot be put to his election as to which he will proceed upon.³ (b)

33. A sheriff may become a trespasser *ab initio* by any abuse of his authority under an execution. Thus the sale, by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*.⁴ (c) But an officer cannot be charged as a tres-

¹ Sanborn v. Hamilton, 18 Verm. 590.

³ Browning v. Skillman, 4 Zab. 351.

⁴ Smyth v. Tankersley, 20 Ala. 212.

² Frost v. Shaw, 3 Ohio, 270.

(a) In an action of trespass, for entering the plaintiffs' store and carrying away their goods, the defendant pleaded, that the goods were the property of others, against whom he as sheriff had executions, which he levied on those goods, and under which he sold them. The plaintiffs took issue on the plea, and the plea was sustained by proof, except as to some articles specified among others in the declaration, and as to which there was no proof of the value, ownership, or taking. Held, that the defendant was entitled to a general verdict. Emanuel v. Cocke, 6 Dana, 212. See Lorier v. Gilpin, Ib. 321.

(a) An entry, by a creditor of A., upon land devised to A. in fee, but subject to a trust for the benefit of B. during the life of A., which entry is made to effect a levy of an execution against A., but without retaining or otherwise interfering with the possession; is not a trespass against A. Butlerfield v. Haskins, 32 Maine, 392.

(c) And, if he has sold the property and received the money, the owner may waive the tort, and bring assumpsit for the money. 20 Ala. 212.

passer, by going behind the judgment on which the execution is founded, although in part illegal. Thus, where the judgment was for the price of goods, part of which had been illegally sold, trespass will not lie against an officer, for applying the proceeds of sales of goods attached on such execution, to a greater amount than was due for the goods legally sold and the costs of the suit; neither is the officer a trespasser *ab initio*.¹

34. An execution only justifies the sheriff in taking the property of the defendant named therein, which is liable to be levied on and sold as his property.² An officer is not authorized, by a precept against one person, to take and sell the property of another, unless he has so conducted himself as to forfeit his legal rights; but he must ascertain at his own risk, (being entitled to require indemnity in doubtful cases,) that the property to be taken and sold is the property of the person against whom he has a precept.³ Thus the levy of an execution against A., upon land in the possession of B., is a trespass, for which the plaintiff in the execution, his attorney, who orders the levy, and the officer making it, are liable, unless they show that the land belonged to the defendant in the execution, and was subject to levy.⁴ And trespass will lie against the sheriff, if his officer take the goods of A. on a *fi. fa.* against B.⁵ And a person whose property is seized, in the hands of another, is not bound to come forward and claim the property and try the right, but may waive that remedy, and sue the officer and the plaintiff in a separate action.⁶ So an entry upon the land of a stranger to the process, under a writ of possession, will not oust him of his possession or right of possession, but the entry and every subsequent act done under it will be a trespass.⁷ And a party does not lose his claim for wrongful levy of an execution, by failing to proceed against the officer for a previous

¹ Walker v. Lovell, 8 Fost. 138.

² Hoyt v. Van Alstyne, 15 Barb. 568.

³ Lathrop v. Arnold, 25 Maine, 136.

⁴ McDougald v. Dougherty, 12 Geo. 613.

⁵ Ackworth v. Kempe, 1 Doug. 40.

⁶ McKay v. Treadwell, 8 Tex. 176.

⁷ Warren v. Cochran, 10 Fost. 379.

attachment of the same property. Thus, where the plaintiff suffered a pair of oxen belonging to him to be attached, with cattle of a stranger, on a writ against the stranger, without giving the officer notice of his title; and, after the lien by attachment had terminated, and the oxen were separated from the other cattle, the officer seized them on an execution against the stranger; held, the plaintiff might maintain trespass against the officer for such seizure, and this without any special notice that the oxen were his property, and without a previous demand.¹

35. In an action of trespass against a sheriff for levying upon property, claimed by a person not the execution debtor, he must show that the plaintiffs named in the execution were creditors of the execution debtor, and that the present plaintiff was a fraudulent purchaser. And although, in a special plea of justification, the officer did not plead the judgment; yet he ought to describe the execution with sufficient certainty, stating out of what court or by what authority it issued, and giving such information in the defence, as may show the plaintiff what is relied on.² (a)

¹ 16 Pick. 19.

² Cook v. Miller, 11 Ill. 610.

(a) In an action against a constable, for taking the property of the plaintiff upon three executions against a third person, the constable filed a special plea, in which he set up an indemnifying bond, executed by the plaintiffs in the executions. Held, the plea need not set out the judgments on which the executions issued. *Davis v. Davis*, 2 Gratt. 363.

Where an execution issues against A., and is levied *bonâ fide* on property in the possession of B., on the allegation that the property is really in A., the action of replevin will not lie against the sheriff. *Carroll v. Hussey*, 9 Ired. 89.

In trespass, for breaking and entering the plaintiff's close and stable, and taking away two horses, the plea was, that an execution against a third person was delivered to the sheriff, &c.; that the horses belonged to the execution debtor and were subject to the execution; that the sheriff by virtue of the execution, and the defendants by his command, broke and entered into the close and stable, and took the horses, &c. Replication, that the horses did not belong to the execution debtor, but to the plaintiff. Held, on general demurrer, that the replication was sufficient. *M'Gee v. Gloan*, 4 Blackf. 16.

36. It is the duty of a sheriff, in good faith, to levy on so much of the property of the defendant, if to be had, as will in all reasonable probability yield, at a public sale, the necessary amount of money.¹ The test to be applied in scanning the conduct of the sheriff, when he has made an insufficient levy on land, is not the opinion of witnesses, or the estimated cash value of such lands in the neighborhood, but the price at which such lands usually sold at a sheriff's sale, or were actually sold on the execution in question. And, in an action for failing to levy upon a sufficiency of property to satisfy the judgment, the measure of damage is the injury sustained. The value of the property levied on should be equal to the debt, making a proper allowance for depreciation in price, the effect of a forced sale, as also costs and other incidental charges.² The officer, in respect to the amount, must exercise a sound discretion; and, it seems, if the quantity seized will, in all reasonable probability, be sufficient, he will not be liable, although it prove insufficient. So, if it far exceeds a sufficient amount, he will not be liable for an excessive levy.³ If he levies on lands which ought, in the estimation of prudent individuals, to produce sufficient, but do not, this furnishes no reason to charge the sheriff, unless actual injury has resulted to other parties from his mistake. And the sheriff exercises all the diligence required by law of him, when, after an unproductive sale of land so levied on, he makes an immediate levy on other property of value sufficient to satisfy the execution, although that cannot be sold until after the return day, and is in fact replevied.⁴ But when a sheriff justifies his refusal to make a levy, or his restoration of the property after a levy has been made, upon the ground that the defendant had *transferred* the property; he assumes the burden of proving that the transfer was *bona fide* and effectual in law for the purpose for which it was made.⁵ And an officer is liable to the execution creditor,

¹ Governor v. Powell, 9 Ala. 83; 8 Ib. 625.

² Griffin v. Ganaway, 8 Ala. 625.

³ Commonwealth v. Lightfoot, 7 B. Mon. 298.

⁴ Powell v. Governor, 9 Ala. 36.

⁵ Smith v. Leavitts, 10 Ala. 92.

for not levying in the precise manner which he prescribes. Thus the plaintiff, having two executions against the same defendant, one of which was secured by an attachment and the other not, delivered them at the same time to an officer, with directions that, in case the defendant should offer by way of set-off an execution sued out by him against the plaintiff, the officer should set it off against the plaintiff's execution which was not secured; but the officer set it off against the other. Held, the officer was liable to the plaintiff for thus defeating his attachment.¹ So, where the plaintiff and his attorney are present on the day of sale, and direct the officer to sell the property according to the statute, and for cash; the officer is bound to follow these instructions, and has nothing to do with former conversations or arrangements between the parties.² (a) But, in the absence of express instructions, the officer is not bound to adopt the most beneficial mode of levying an execution. Thus a creditor attached the interest of his debtor in real estate, consisting of a homestead and of a wood-lot mortgaged to different persons. The debtor subsequently mortgaged the homestead to W., and another creditor then attached the interest of the debtor in the real estate; and the executions of both creditors were delivered to the officer at the same time. The officer levied the first creditor's execution on the equity of redemption in the wood-lot, and in consequence the second creditor's execution remained unsatisfied. Held, the officer was not liable to an action for so doing.³

¹ Coggeshall v. Varnum, 19 Pick. 422.

² Lavin v. Willard, 16 Pick. 64.

³ Walworth v. Readsboro, 24 Verm.
252.

(a) If a writ, issued from a court of competent authority, has been superseded, after it has come into the hands of the proper officer, it is the duty of the party against whom it issued, to have the officer notified of the *superse-des*, in such manner that he will be protected in refusing to execute the writ. And an officer, having a valid execution in his hands, must be served with a written order from competent authority, requiring him to suspend all action upon it, before he can be held liable for obeying its mandate. *Payne v. The Governor*, 18 Ala. 320.

37. We have already (p. 350) considered the duty of an officer as to the *return* of process served by him. With regard to the return of *executions* it is held, that, when a sheriff neglects to return an execution, the plaintiff has a *prima facie* right to recover the amount thereof, in an action against the sheriff; but the sheriff may show, in mitigation, that the defendant had no property subject to levy, though not that he now has sufficient to pay it.¹ So, although the creditor may have sustained no damage in consequence of the neglect, he is entitled to nominal damages; for, where there is a neglect of duty, the law presumes that damages have been sustained.² (a) And, in an action against a sheriff for a false return on an execution, where there is property enough to levy it on, the damage to be recovered is the amount of the execution. He will not be permitted to prove that a less sum was due on the judgment.³ So, in a proceeding against an officer for failure to return an execution, a tender by him of the amount thereof, after notice and before judgment, is no ground of defence against the motion. The failure to return the execution according to law fixes the liability of the officer, which cannot be discharged by a tender.⁴ So, where the return day of an execution levied on land falls within the time allowed by law for recording the execution in the registry of deeds, if the officer does not either cause it to be duly recorded, or return it into the clerk's office on or before the return day, or deliver it to the creditor in season to be put upon record; he will be liable to the creditor for the value of the land lost by his neglect.⁵ But the law does not require the sheriff of another county, to whom an execution is issued, to return it either in person or by deputy. If he deposits it in the post-office, properly directed, in time to

¹ Ledyard v. Jones, 3 Seld. 550.

² Lafin v. Willard, 16 Pick. 64.

³ Bacon v. Cropsey, 3 Seld. 195.

⁴ Chaffin v. Crutcher, 2 Sneed, 360.

⁵ M'Gregor v. Brown, 5 Pick. 170.

(a) A sheriff is not liable to be *amerced* for not returning an execution according to law. Ritter v. Merscales, 4 Zab. 627.

reach the clerk of the court from which it issued by the return day, it is sufficient.¹

38. If a sheriff sell goods upon an execution without legally advertising the sale, and return that he advertised and sold them according to law, he will be liable to an action on the case for a false return, but the judgment debtor cannot maintain trover for the goods.²

39. A sheriff is required to use ordinary diligence only in the execution of process. Hence, if a debtor has property, and the sheriff, exercising ordinary diligence, which is a question of fact for the jury, has no notice of it; he is not liable on a return of *nulla bona*.³

40. The liability of an officer, in reference to the payment of money received by him from a sale on execution, has often come in question. The subject, however, is usually regulated by statutes; which enforce this important duty by a rigid forfeiture for its violation.

41. It is held, that a sheriff is not bound to collect an execution, and pay the amount to the plaintiff, before the return day of the writ.⁴ (a) So in Massachusetts (b) it is

¹ Underwood v. Russell, 4 Tex. 175.

² Livermore v. Bagley, 3 Mass. 487.

³ Barnes v. Thompson, 2 Swan, 313.

⁴ The State v. Mann, 13 Ired. 444.

(a) In general, the sheriff is bound to pay over money at the return day, though not demanded; and before, if demanded. Dale v. Birch, 3 Camp. 347; Rogers v. Sumner, 10 Pick. 387.

If a deputy receive the debt and cost, and stay service, the sheriff is immediately liable for the amount, without demand. Green v. Lowell, 3 Greenl. 373.

If a sheriff pays money raised under a *fi. fa.* to the plaintiff in the execution before the return day, or permits him to purchase the goods, and the writ is set aside by the Court, he is liable to subsequent execution creditors; and a decree of the Court, sanctioning the payment, will not protect him, where the money has not been paid into court. Williams's Appeal, 9 Barr, 267.

(b) In this State, special provision is made for the application of surplus moneys arising from an execution sale to other executions placed in the hands of the officer for that purpose. In an action against a sheriff, for not

held, that a sheriff is not obliged to bring money into court which he has received on execution, but may retain it till demanded. But, after demand and refusal, whether before or after the return day of the execution, he is liable to the creditor's action for the money, and interest at the rate of 30 per cent.¹ And an action lies, though there are conflicting claims to the money, and the creditor refuses to give the officer a bond of indemnity. But not, in such case, in the absence of any sinister motive on the part of the officer, for the statutory penalty of five times the lawful interest, imposed for *unreasonably* neglecting or refusing to pay over money.² So, where a sheriff has collected money on execution, and is notified not to pay it over to the plaintiff, and a motion for that purpose is made in court; he is not liable to the plaintiff for the penalty of 5 per cent. per month, for not paying him the money, until the decision of such motion.³ But if he refused to pay over the money, because, by direction of the debtor, he has attached it, on a writ in favor of the debtor against the creditor, he is subject to the statute penalty.⁴ The very strict rule has also been applied, that, where an officer, who had collected money upon execution, paid it to the creditor's attorney of record in the action, but whose power had been revoked by the creditor before the

¹ Wakefield v. Lithgow, 3 Mass. 249 ;
Rogers v. Sumner, 16 Pick. 387. See
Church v. Clark, 1 Root, 333; Nelms
v. Williams, 18 Ala. 650.

² Rogers v. Sumner, 16 Pick. 387.

³ Conway v. Campbell, 11 Mis. 71.

⁴ Thompson v. Brown, 17 Pick. 462.

paying over money collected on an execution in favor of the plaintiffs, the declaration alleged, that the execution was delivered to the defendant; that he ought to have satisfied it out of moneys of the debtor, arising from the sale of his property made by the defendant, which property was attached by the defendant on the writ; and that the moneys were more than sufficient to satisfy the execution, after paying off all previous attachments. Held, that in order to bring the case within the Stat. 1804, c. 88, § 6, it should have been averred, that the sale was made by the defendant *virtute officii*, and that the plaintiff's execution was delivered to the defendant, before he had paid over the surplus money to the debtor. Wheeler v. Willard, 14 Pick. 486. See Buckmaster v. Drake, 5 Gilm. 321.

execution was delivered to the officer; this was no legal discharge of the officer.¹

42. It has been held that a sheriff, who receives money on an execution *after the return day*, and fails to pay it over, is not liable for the failure in his official capacity; but he is liable to the plaintiff in an action for money had and received.² But a sheriff by whom an execution has been levied on personal property, whilst the execution is in force, may sell after the return day of the writ, and, having the power to sell, he may receive the money in satisfaction of the execution, without a sale, and, by such receipt and failure to pay it over to the plaintiff, subject his securities to liability therefor.³

43. In an action against the sheriff for money collected, the return on the execution of the amount collected, made by his deputy, is held conclusive in favor of the plaintiff.⁴ So, in an action against a sheriff, for the default of his deputy in not paying money made by him on an execution, which he returned satisfied, and on which he sold chattels alleged by him in his return to have been the property of the execution debtor; the sheriff cannot defend, by showing that the chattels were the property of a third person, who forbade the sale, and directed a suit to be brought against the deputy for a trespass, without evidence that such suit was commenced, and a judgment recovered against the deputy. And it is doubted whether proof of such judgment would constitute a defence.⁵ But on the other hand it is held, that, in a suit for not paying money, the sheriff may show, even in contradiction of his return, that the goods belonged to a third person, to whom he is liable; or that the judgment debtor has become bankrupt, and the money belongs to his assignees.⁶

And where a sheriff sells property under a junior execution, having an elder one in his hands at the time, he is bound to

¹ *Parker v. Downing*, 13 Mass. 465.

⁵ *Weston v. Ames*, 10 Met. 244.

² *Hamilton v. Ward*, 4 Tex. 356.

⁶ *Brydges v. Walford*, 6 M. & S. 42;

³ *Evans v. The Governor*, 18 Ala. 659. ² *Greenl. Ev.* § 588, n.

⁴ *Sheldon v. Payne*, 3 Seld. 453.

apply the proceeds to the satisfaction of the senior *fi. fa.*, though between the times, when they were respectively received by him, the debtor sold property, which the senior creditor declined to allow the sheriff to levy upon.¹

44. Money in the hands of a sheriff, collected under execution, when not more than sufficient to satisfy the debt and costs, is the money of the plaintiff in execution; and the extent of the sheriff's lien upon the fund, in case of a controversy, must be settled between him and the plaintiff. And when the money collected is not enough to satisfy the debt and lawful costs, and the sheriff retains more than his lawful fees; the defendant in execution cannot, after paying to the plaintiff the balance of his debt, allowing the sum appropriated by the sheriff, recover from the sheriff the amount unlawfully retained by him.²

45. Though a sheriff goes out of office before completion of the execution of process, he is still liable to pay over the money collected on execution, and the interest provided in such case by statute, on motion.³ And where a sheriff, after his term of office had expired, appointed an agent to attend to all the business relating to the office, with full authority to pay out, or to refuse to pay; it was held, that a demand from such agent, for money collected, was a sufficient demand to charge the sheriff.⁴ (a)

¹ *Furman v. Christie*, 3 Rich. 1.

² *Chenault v. Walker*, 22 Ala. 275.

³ *Buckmaster v. Drake*, 5 Gilm. 321.

⁴ *Alexander v. Hancock*, 2 Rich. 100.

(a) It is the duty of a *deputy*, to pay over to the principal sheriff all the moneys collected by him, as such, within a reasonable time, and, if he fail to do so, an action may be maintained against him without a previous demand. *Nelms v. Williams*, 18 Ala. 650.

And the rule applicable to common-law actions against the sheriff, for failing to pay over money collected by virtue of his office, applies where the deputy is sued by the principal sheriff for a similar default. *Ibid.*

Where a judgment has been recovered against a sheriff, for the default of his deputy in failing to pay over money received on an execution, the sheriff may, though he has discharged the judgment, maintain a motion

46. An officer, having personal property in his possession, by virtue of an execution against the owner, may maintain trespass against any one who takes it out of his possession ; although the execution has not been returned, if the return day has not arrived.¹ And the officer has been held to have this right of action without actual possession. Thus, where a constable levies on personal property, and leaves it in the possession of the defendant, he only loses his lien thereon, when the property is levied on under other executions, and may maintain trover against one who removes it without such execution.² So, where a constable levied an execution on the defendant's horse, and it was agreed that the defendant should ride the horse home, and that the constable should wait for his money, it was held that the agreement was merely voluntary, and that the constable might reseize the horse, and, if it was taken from him by force, might bring trover to recover it.³ (a) But to maintain trover for goods taken in execution, the officer must have made an actual and effectual levy.⁴

¹ Sewall v. Harrington, 11 Verm. 141.

² Douglass v. Mitchell, 2 Murph. 237.

³ Brian v. Strait, Dudley, 8. C. 19.

⁴ Mangum v. Hamlet, 8 Ind. 44.

against the deputy and his sureties, for the amount of the judgment recovered against him. *Weaver v. Skinker*, 4 Gratt. 160.

But, where a sheriff has satisfied a judgment, recovered against himself for the default of his deputy, in failing to pay over money received on an execution, he can, upon a motion against the deputy and his sureties, recover only the amount of such judgment, and not the aggregate amount of debt, interest, and costs, with interest thereon. *Ibid*.

And a statute which provides that, where a sheriff has paid or is liable to pay money for the default or misconduct of his deputy, he may, by motion, recover judgment against the deputy and his sureties, upon satisfactory proof, &c., does not change the common-law principles applicable to such cases ; and, therefore, if the insufficient return is in the handwriting of the sheriff, though signed by his deputy, there is no " default or misconduct " on the part of the deputy. *Cate v. Howard*, 1 Swan. 15.

(a) A constable levied an execution on a mare, which was claimed by a third person, and on a trial of the right of property the claimant succeeded. Pending the trial, the constable delivered the mare to A. and B., one of

47. The right of the officer, to maintain an action on account of property levied upon, has been held to exclude any such right on the part of the judgment creditor. Thus, where a levy has been made on goods, which are afterwards distrained by the landlord for rent in arrear, no action can be maintained against the landlord by the execution creditor, but only by the officer.¹

48. With regard to the measure of damages against an officer, for his default in relation to an execution, it will be, in general, the injury actually sustained by the plaintiff therefrom. Thus it has been held, that, in an action against a sheriff, for failing, through mere negligence, to make the money on an execution, and to return it according to its mandate, (see p. 352); the amount of the execution is the measure of damages, notwithstanding the defendant may have continued entirely solvent; and that the mere failure of the plaintiff to enforce satisfaction of his execution from the defendant, when he could have done so, does not impair his remedy against the sheriff.² But the prevailing rule is, that the measure of damages is the amount of injury actually sustained. (See chap. 20.) Thus the plaintiff, being grantee of an equity of redemption, for the purpose of strengthening his title, caused it to be sold on an execution which he held against his grantor, and bid it off himself for the amount of the execution, and took a deed of it from the officer, but paid the officer no money except his fees and expenses. In consequence of a neglect on the part of the officer, the sale proved ineffectual, but the plaintiff's title

¹ Taylor v. Manderson, 1 Ashm. 130.

² Evans v. The Governor, 18 Ala. 659.

whom was the execution plaintiff, they agreeing in writing to return the mare to the constable, or pay him \$35.50 should the claimant succeed. After the trial, A. and B. tendered to the constable \$35.50, which he refused, but they would not return the mare. Held, that the constable could not maintain trover against A. and B. for the mare. Grady v. Newby, 6 Blackf. 442.

was valid independently of the sale. Held, the plaintiff might maintain an action against the officer for his default, but the measure of damages was not the sum bid by the plaintiff at the sale, but the amount of the fees and expenses actually paid by him, with interest from the time of payment.¹

¹ *Sexton v. Nevers*, 20 Pick. 451.

CHAPTER XXII.

ARREST, BAIL, ESCAPE.

1. Arrest.
2. Bail.

6. Escape.

1. *Arrest of the body*, as well as seizure of property, being a mode provided by law for the service of civil process; the rights and liabilities of an officer are also to be considered in the former as well as the latter point of view. (a)

2. The rights and duties of officers in reference to *bail* are often brought in question.

3. It is held in England, that, if a defendant in custody upon mesne process tender a bail bond, with sufficient sureties, to the bailiff, and he refuse it, yet an action of trespass will not lie against him, but only an action on the case against the sheriff.¹ But, in an action for refusing to take bail, it is sufficient to prove the arrest, the offer of sufficient bail, and the commitment. The party is not bound to tender a bond.²

4. It was formerly held, that an action on the case will not lie against the sheriff, though he take *insufficient bail*; but that he shall be *amerced*, if the defendants do not appear.³

¹ Smith v. Hall, 2 Mod. 32.

² Ellis v. Yarborough, 2 Mod. 178.

³ Millne v. Wood, 5 C. & P. 587.

(a) In an action for failing to serve a *capias*, the sheriff cannot show that he and his deputies had always found difficulty in arresting the party. *Spence v. Tuggle*, 10 Ala. 538.

If a judgment creditor directs an officer to arrest the debtor on execution, but not to commit him until further orders, the officer is justified in not arresting him. *New Hampshire, &c. v. Varum*, 1 Met. 84.

But it is a well settled rule of American law and practice, that an action lies against the sheriff for taking insufficient bail,¹ and damages may be assessed according to the plaintiff's real loss, owing to the sheriff's neglect.² Thus if a sheriff knowingly take insufficient bail, it is held that he is liable for the amount of the plaintiff's judgment against the bail, deducting the probable value of that judgment and of the judgment against the principal.³ So it is said, "bail is still regulated by the statute 23 Hen. VI. c. 10, which has always been recognized in the United States as Common Law. The first branch of this statute, for it consists of only one section, requires the sheriffs to 'let out of prison, &c., upon reasonable *sureties*, &c., having sufficient, &c.'"⁴ Hence, if only one surety be taken, the sheriff is at all events responsible for his sufficiency; though the bond is not thereby avoided.⁵ (a) And slight evidence of the insufficiency of bail is sufficient, upon the general ground that the defendant, having himself taken them, is presumed to have the means of proving their ability.⁶ So the plaintiff need not prove knowledge of the bail's insufficiency.⁷ Thus the sheriff is liable for taking a forged bail bond, though he believed it genuine.⁸ And the plaintiff need not have actually proceeded against the bail.⁹ And, on the other hand, where he takes an assignment of the bail bond from the

¹ 2 Mass. 188. See *Young v. Hosmer*, 11 Mass. 89. *lings*, 9 Mass. 479; *Glezen v. Rood*, 2 Met. 490.

² *Shackford v. Goodwin*, 13 Mass. 187.

³ *Gerrish v. Edson*, 1 N. H. 82.

⁴ 2 Greenl. Ev. § 586, n. 4.

⁵ 2 Saun. 61 d, n. 5; *Long v. Bil-*

⁶ *Saunders v. Darling*, Bull. N. P. 60; 2 Greenl. Ev. § 586.

⁷ *Sparhawk v. Bartlett*, 2 Mass. 188; *Concanen v. Lethbridge*, 2 H. Bl. 36.

⁸ *Marsh v. Bancroft*, 1 Met. 497.

⁹ *Young v. Hosmer*, 11 Mass. 89.

(a) In South Carolina, a sheriff may take as bail one not a resident of his district, and having no property therein. *Dickison v. Coward*, 3 Rich. 49.

So he is not bound to take more than one person as bail; unless he knows, or under the circumstances should have known him to be insufficient. *Bennett v. Brown*, 5 Rich. 347.

sheriff, and sues the bail to insolvency, this is no discharge of the sheriff's liability for taking insufficient bail, nor an estoppel of the plaintiff's right of action against him.¹ But it is sufficient to show that the bail were at the time apparently responsible, or that he used a reasonable discretion.² And it is held, that where the plaintiff neglects for five years to call on the officer for bail, the lapse of time is sufficient to exonerate the officer.³

5. An officer is also liable to an action, for failing to *return* a bail bond with the writ, where the law so provides. If he deliver or offer to deliver it to the plaintiff, in season for the plaintiff to prosecute a *scire facias* against the bail, the sheriff is liable for nominal damages only.⁴ But, in an action by a judgment creditor against the sheriff, for not delivering over the bail bond, the debtor having avoided on the execution, the sheriff cannot show, in mitigation of damages, that the debtor has been insolvent from the time of the rendition of the judgment.⁵ Nor is it necessary to allege, that an execution against the debtor was returned *non est inventus* within a year after judgment; nor that such person had avoided; nor that the plaintiff, or any one in his behalf, made the oath required by statute to warrant an arrest.⁶ So, where the sheriff has falsely returned that he took bail, in an action for refusing to deliver the bail bond to the creditor, he is liable to the full amount of the judgment, and cannot show the inability of the debtor to pay it; because this would be no defence for the bail themselves.⁷ But if an officer, having a writ against a debtor in extreme sickness and poverty, and having arrested him, untruly returns that he has taken bail; in an action for false return, he may show these facts, in mitigation of damages, and that the debtor, having recovered his health, did not conceal himself; and the jury may lawfully give nominal damages only.⁸

¹ Bennett v. Brown, 1 Strobb. 303.

² Jeffery v. Bastard, 4 Ad. & Ell. 823; Hindle v. Blades, 5 Taun. 225.

³ Gill v. Stebbins, 2 Paine, C. C. 454.

⁴ Glezen v. Rood, 2 Met. 490.

⁵ Seely v. Brown, 14 Pick. 177.

⁶ Prescott v. Bancroft, 1 Met. 500.

⁷ Simmons v. Bradford, 15 Mass. 82.

⁸ Weld v. Bartlett, 11 Mass. 470.

6. Another form of liability of officers, is for an *escape*. "Every liberty given to a prisoner, not authorized by law, is an escape."¹ Thus, if a coroner, having an execution against a deputy jailer, arrests him, and the sheriff is not at the jail, nor any keeper authorized by him; the coroner, leaving his prisoner at the jail house, is discharged, and the sheriff is guilty of an escape.² So it is an escape to make a prisoner in debt a turnkey, and entrust him with the keys of the outer and inner doors, at all times, by day and night. Or to commit a jailer to his own jail, appointing no new keeper.³ But if the sheriff permit a debtor, who has been surrendered by his bail, and by the Court committed to the custody of the sheriff, to go at large before the expiration of thirty days; he shall be chargeable for an escape, although he was not furnished with a copy of the order of Court committing such debtor.⁴ So the sheriff is chargeable for an escape, if he give a prisoner the liberty of the yard on a bond, in a penal sum less than double the amount of the sums for which he is imprisoned, as required by law, although approved by two justices according to the statute.⁵ So a sheriff is liable for the escape of a debtor committed on mesne process, although the creditor, while the suit was pending, procured an amendment of his declaration, which entitled him to enhanced damages; at least to the extent to which he would have been liable, if no amendment had been made.⁶ So an action on the case will lie against a sheriff, for refusing to assign to the creditor, upon request, after breach of condition, a jail bond, taken upon admitting the debtor to the liberties of the prison. And where such bond was taken, upon the commitment of the debtor on mesne process, it is no excuse for the sheriff, that, pending the suit, the plaintiff, by leave of Court, added a count for a new and distinct cause of action, and that his judgment was rendered for a sum in damages, founded upon claims

¹ Per Parsons, C. J., *Colby v. Sampson*, 5 Mass. 312.

² *Colby v. Sampson*, 5 Mass. 310.

³ *Steere v. Field*, 2 Mas. 486.

⁴ 2 Mass. 549.

⁵ *Clapp v. Hayward*, 15 Mass. 276.

⁶ *Vilas v. Barker*, 20 Verm. 603.

embraced in both counts. The surety in the bond can alone insist upon such matter in avoidance of the bond.¹ But it is not an escape, if the door of a prison, in which a debtor was confined under a *ca. sa.*, is permitted to remain open, the debtor not leaving the prison.² So an officer, having a debtor in custody, may allow him reasonable liberties; and the debtor cannot set up such liberties as an escape, provided there be no abandonment of the arrest.³

7. If a party be in custody on final process, he may be retaken after a *negligent* escape; but not after a *voluntary* escape.⁴ And if, in the latter case, the creditor will not authorize a recapture, this is not such a discharge of the debtor from imprisonment as will discharge the debt, and the sheriff will be liable for it.⁵ But it is a justification to the bailiff against an action of false imprisonment, that he retook a prisoner before the return of the writ on mesne process, though he had voluntarily permitted him to go at large after the first arrest.⁶ (a) And, where the sheriff arrested a defendant by virtue of a *ca. sa.*, and in good faith released him by taking bond for his appearance at court, to take the benefit of the act for the relief of honest debtors, in an amount less than twice the amount of the creditor's demand; held, he was not guilty of a voluntary, but of a negligent escape, and might retake the defendant in a *ca. sa.* and surrender him in court, in discharge of his liability to an attachment for contempt.⁷ So, where a sheriff's officer kept the defendant in custody after return of the writ, and then committed him to prison; held, no action would lie for an escape.⁸

¹ *Vilas v. Barker*, 20 Verm. 603.

² *Currie v. Worthy*, 2 Jones, Law, 104.

³ *Butler v. Washburn*, 5 Fost. 251.

⁴ *Ibid.*

⁵ *Jackson v. Hampton*, 6 Ired. 34.

⁶ *Atkinson v. Matteson*, 2 T. R. 172.

⁷ *Colley v. Morgan*, 5 Geo. 178.

⁸ *Planck v. Anderson*, 5 T. R. 37.

(a) An action on the case lies against a *jailer*, for voluntarily permitting the escape of a prisoner confined on mesne process, though the prisoner returns to prison on the same day, and the plaintiff proceeds to final judgment against him. *Ravenscroft v. Eyles*, 2 Wils. 294.

8. In an action for an escape, the sheriff cannot take advantage of an *irregularity* or *error* in the process, which does not render it void.¹ But he may show want of jurisdiction in the Court.² Or that the process was void.³ (a) Thus a sheriff is not liable for an escape, where his prisoner is discharged, on *habeas corpus*, by the Supreme Court commissioner, in a case where such commissioner has jurisdiction, although his decision is erroneous.⁴ And, to render a sheriff liable for the escape of an insolvent surrendered in open court, it is necessary to show that such insolvent was committed to his custody by an order of the Court. A mere prayer to that effect is not sufficient.⁵

9. An officer, being liable for suffering an escape, is of course authorized to use force to prevent it. And where, in an action for assault and battery, the defendants justified under process, and it appeared on the trial, that the injuries complained of were committed on a recaption of the plaintiff, after one escape, and in efforts to overcome resistance, and to prevent another; the plaintiff alleging that *excessive force* was used; it was held, that the *onus* was on him to prove that the force was excessive.⁶

10. The amount of damages for an escape depends somewhat upon the form of action and the nature of the escape. In an action of *debt* for an escape, the measure of damages is the amount of the judgment.⁷ This action, however, has been expressly abolished in some of the United States. And it is said, the action of *debt* for an escape is founded upon

¹ Spafford v. Goodell, 3 McLean, 97.

² Bull. N. P. 656; Bissel v. Kip, 5 Johns. 89; Yelv. 42 a, n. 1; Carth. 148; Albee v. Ward, 8 Mass. 79; Bushe's case, Cro. Eliz. 188.

³ Howard v. Crawford, 15 Geo. 423.

⁴ Wiles v. Brown, 3 Barb. 37.

⁵ Siler v. McKee, 2 Jones, Law, 379.

⁶ Henry v. Lowell, 16 Barb. 268.

⁷ 2 Greenl. Ev. § 599.

(a) A jailer is not liable for an escape, for not detaining a debtor, who is committed upon what appears, from the copy left with the jailer at the time of commitment, to be a void process. He is not bound to look beyond his copy. As where the copy showed that the original process was a writ of summons. Kidder v. Barker, 18 Verm. 454.

two ancient English statutes. A distinguished Judge remarks, "there does not seem any reason to suppose that debt was a remedy for an escape, at the common law; for, according to all analogies of that law, it lay not in cases of tort, but of contract only, where the claim was for a sum certain; and it seems impossible to conceive that the injury to the plaintiff, in cases of escape, could always be a sum certain. From the nature of the case, it is a tort, and sounding in damages, and perpetually varying in measure and extent. The statutes of West. and 2 Rich. II. were, in my judgment, introductive of new law."¹ In conformity with these views it is held, that, in case of voluntary escape, the amount of the judgment is the measure of damages.² So, that when a creditor fails to collect the amount due on a jail bond, by reason of the poverty of the signers, he may sustain case against the sheriff, as for an escape; and the rule of damages is the amount of the debt. And the poverty of the signers is sufficiently proved by evidence that they have removed from the State, leaving no property within the State, from which the collection of the debt could be enforced.³ But, on the other hand, the general rule is, that only the actual damage can be recovered;⁴ predicated upon the amount of the party's property.⁵ And, upon this principle, no action lies for an escape on mesne process unless the plaintiff could have maintained the original action.⁶ Nor, if the party is afterwards in custody, without proof of actual damage.⁷ And even in case of a *voluntary* escape of a debtor committed on mesne process, the defendant may prove, in mitigation of damages, that the debtor was unable to pay the debt.⁸ So, in reference to *the burden of proof*, in an action for the escape of a debtor committed

¹ Per Story, J., *Steere v. Field*, 2 Mas. 513.

² *Paten v. Halsted*, 1 Cox, 277.

³ *Wheeler v. Pettes*, 21 Verm. 398.

⁴ *Potter v. Lansing*, 1 Johns. 215; *Russell v. Turner*, 7 Johns. 189; *Governor v. Matlock*, 1 Hawks, 425; *Colby*

v. Sampson, 5 Mass. 310; *Rawson v. Dole*, 2 Johns. 454; *Taylor v. Commonwealth*, 3 Bibb, 356.

⁵ *Spafford v. Goodell*, 3 McLean, 97.

⁶ *Riggs v. Thatcher*, 1 Greenl. 68.

⁷ *Planck v. Anderson*, 5 T. R. 37.

⁸ *Brooks v. Hoyt*, 6 Pick. 468.

on execution, the plaintiff is not entitled to recover the whole amount of his debt, unless the defendant prove the debtor's inability to pay it; but only such an amount of damage, upon all the evidence in the case, as he has sustained by the escape.¹

11. For the escape from jail of a debtor, under a *ca. sa.*, nothing will excuse the sheriff but the act of God or the public enemy.² So a voluntary return before suit brought is not a defence in an action for an escape, whether negligent or voluntary, on *mesne process*, after return of the writ.³ Nor an unreasonable delay of the creditor, after being apprised of the escape, to call for an assignment of the bond; if the sheriff were also apprised of the escape.⁴ So, where a defendant detained under *mesne process* escaped, and the sheriff obtained leave to appear and defend the original suit, and judgment was recovered on a declaration filed against the original defendant; held, the plaintiff did not thereby elect to consider the defendant in custody, nor to discharge the sheriff; for the proceeding was wholly void, except to ascertain the extent of the sheriff's liability.⁵ But the sheriff may prove in defence that the debtor was *rescued* in going to jail.⁶ (a)

¹ Chase v. Keyes, 2 Gray, 214.

⁴ Wheeler v. Pettes, 21 Verm. 398.

² State v. Halford, 6 Rich. 58.

⁵ Scarborough v. Thornton, 9 Barr,

³ Stone v. Woods, 5 Johns. 182. 451.

See Richmond v. Tallmadge, 16 Johns.

⁶ Bull. N. P. 68.

308; Drake v. Chester, 2 Conn. 473.

(a) In an action for rescue, the return of the officer, that he had arrested the body of the debtor, and that he was rescued by the defendant, is not conclusive evidence of the fact. Francis v. Wood, 28 Maine, 69.

CHAPTER XXIII.

MISCELLANEOUS PUBLIC OFFICERS.

1. General official liability.
2. Clerks of courts.
3. *Voting*.
4. *Taxes*.

7. Highways.
9. *Military* officers.
10. Miscellaneous cases.

1. IT remains very briefly to notice the rights and liabilities of some other *public officers*. It is remarked in general terms, that "if a *public officer* abuses his office, either by act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."¹

2. Questions, similar to those which relate to sheriffs, charged with the execution of civil or criminal process, sometimes arise in reference to other *ministerial officers of courts*. Thus an action on the case was brought against a clerk of the Insolvent Debtors' Court, for wrongfully, maliciously, falsely, and unlawfully making out an order, purporting to be an order of that Court for the discharge forthwith of an insolvent debtor, who was adjudged by the Quarter Sessions to be detained in custody for two years at the suit of the plaintiff, with an averment that the Insolvent Debtors' Court did not pronounce any such order, or give any authority to the defendant to write, make out or issue the same, whereby the prisoner was discharged forthwith, and by means whereof the plaintiff was injured, and had lost all means of enforcing payment of the debt and costs due to him from the prisoner. Upon writ of

¹ Per Best, C. J., *Henly v. Mayor, &c.* 5 Bing. 107.

error, held, that the supposed order of the Insolvent Debtors' Court was not to be understood as the order of that Court until set aside, and that the declaration was not demurrable, for not averring that it was set aside.¹

3. Questions sometimes arise as to the rights and duties of officers in connection with the privilege of *voting*. (See i. 85 and n.) Thus an action on the case lies by a burgess against the returning officer of a borough, for refusing his vote at an election of members of Parliament.² But in such an action malice must be proved as well as laid. And, it seems, a charge that the defendant, knowing, &c., and wrongfully intending to deprive the plaintiff, &c., hindered him from giving his vote, &c., is a sufficient allegation of malice.³ So, in Massachusetts, where a person who had been a member of a voluntary religious society demanded permission to vote, at a meeting of the first parish in the town where he dwelt, and produced to the presiding officer a certificate of the clerk of the voluntary society, that he had ceased to be a member thereof; it was held, that he was entitled to vote at the parish meeting, (being otherwise duly qualified,) and that an action lay against the presiding officer, for refusing to receive his vote.⁴ (a)

4. *Taxation* gives rise to another class of rights and liabilities; whether in reference to the officers who *impose* or *assess*, (b) or those who *collect* them. Thus trespass

¹ *Whitelegg v. Richards*, 3 Dowl. & Ry. 237.

² *Ashby v. White*, 1 Brown, P. C. 62.

³ *Drew v. Coulton*, 1 E. 563.

⁴ *Oakes v. Hall*, 10 Pick. 333.

(a) It is competent for selectmen, although not their duty, to add the name of a legal voter to the voter's list after the voting commences; but they cannot during such time hold a regular meeting for the correction of the list. *Waite v. Woodward*, 10 Cush. 143.

(b) In Massachusetts, assessors are liable, notwithstanding Rev. Stats. c. 7, § 44, for assessing, and issuing a warrant for the collection of a school district tax, if the school district was not legally organized, although it was

lies against selectmen for seizure of person or property, made to enforce payment of a tax illegally assessed.¹ So case lies against selectmen for illegally assessing and collecting taxes.² (a) The plaintiff must prove the election and qualification of the defendants by the records. Secondary evidence is admissible, only upon proof that the records are lost or missing.³ So the declaration alleged, that the defendants illegally and without right made a tax or assessment upon the plaintiff's poll and estate. Held, this averment was not supported by evidence merely that they assessed such tax. No presumption arises from the mere fact of an assessment, that it is unlawful.⁴ But, in an action against an assessor, for an imprisonment of the plaintiff for non-payment of a school district tax, alleged to be illegal for want of legal school districts in the town ;

¹ Osgood v. Blake, 1 Fost. 550.

² Griffin v. Rising, 2 Cush. 75.

³ Osgood v. Clark, 6 Ib. 307 ; Perry v. Bass, 15 N. H. 222.

⁴ Perry v. Buss, 15 N. H. 222.

certified to them, by one acting as clerk of the district, that the tax had been voted by the district. *Dickinson v. Billings*, 4 Gray, 42.

So assessors, who place upon their roll the name of a person not liable to taxation in their town or district, in consequence of which his property is levied upon for the taxes, are responsible to him for damages. *Mygatt v. Washburn*, 1 Smith, 316.

But assessors, in deciding the question of residence with reference to taxation, act *judicially*, and, so acting within the extent of their authority, are not liable to an action, though they err in judgment. *Brown v. Smith*, 24 Barb. 419.

If a district clerk, in giving notice of a special district meeting regularly called by the trustees, misrepresent the object of the meeting to some of the taxable inhabitants, who in consequence thereof omit to attend, and a district tax is voted at such meeting ; the trustees, who cause the tax to be collected, are not thereby rendered trespassers, unless they are parties to the fraud. *Randall v. Smith*, 1 Denio, 214.

(a) In case, the *unlawful assessment* being the gravamen of the action, the particular matter in which the unlawfulness consists should be set forth and proved specifically. Nor will the introduction of general averments of the illegality, &c., change the burden of proof. 15 N. H. 222.

if the arrest is admitted or proved, the burden is on the defendant to prove that the entire town was legally districted by territorial limits. This burden is not shifted, by proof of the existence of districts *de facto* for more than forty years throughout the entire town; nor by proof that a town record book, now lost, contained a record of a districting of the entire town; it not appearing that such record was made after the statute which required territorial districts.¹

5. An unauthorized sale of property by a *collector* of taxes amounts to a conversion, and the owner may maintain trover against him.² And where a collector, by virtue of an assessment warrant, levied upon the goods of a person not named in the warrant nor liable to pay the assessment, threatened to remove the goods, and gave him notice that he would sell on a day specified, if he did not previously pay; held, payment, made when the collector was about to remove the goods for sale, was not voluntarily made, and the collector was liable in trespass.³ So, in an action for assault and battery, and false imprisonment, where the defendants, by plea, attempted to justify, under a warrant of distress for the collection of taxes, and it appeared by the plea that the warrant was attempted to be executed more than three years after it was delivered to the collector, and no sufficient excuse was set forth for such delay; held, the plea was fatally defective, unless the defect was supplied in the replication.⁴ So the heirs-at-law of an estate gave a chaise and money belonging to the estate in exchange for another chaise. A collector of taxes sold the chaise, as the property of the heirs, for non-payment of an illegal tax assessed against them. Held, that trespass would lie in favor of the heirs against the collector, and, as the administrator had not ratified the sale, and as no persons in interest had objected, that the defendant could

¹ Bassett v. Porter, 10 Cush. 418.

² Wetmore v. Campbell, 2 Sandf.

³ Thompson v. Carrier, 4 Fost. N. 341.
H. 237.

⁴ Shaw v. Peckett, 25 Verm. 423.

not now object to the right of the plaintiff to maintain the action; also, that, as the tax was illegal, the possession of the plaintiffs was sufficient to enable them to maintain trespass against the defendant, who had no right to take the property.¹

6. Questions also arise, in reference to the title of property illegally taken for taxes. Thus A., residing in another State, owned a building in Lawrence, in Massachusetts, standing by consent on the ground of another person. The building was taxed to A., in Lawrence, as real estate belonging to a non-resident, but was subsequently sold by the tax collector as personal property. Held, the purchaser was liable in trespass for entering the building without A.'s consent.² But a deed, duly acknowledged and registered, from an officer whose duty it is to sell land for non-payment of taxes, gives a title sufficient to enable one holding under the grantee to maintain trespass against a mere stranger.³

7. In New York, no action will lie against an *overseer of highways*, (see chap. 25,) in favor of a private individual, for an injury sustained in consequence of the neglect of the overseer to keep a bridge in repair. The party injured can sue only for the statutory *penalty*, for each neglect or breach of duty. And, if an action would lie, it must be on the statute; and the declaration ought to state specially the cause of action arising under the statute, and every fact necessary to enable the Court to judge whether there has been a breach of duty. Not, generally, that the defendant was an overseer of highways, and wilfully neglected his duty and suffered the bridge to remain out of repair, whereby the plaintiff's horse fell through, &c. And such a declaration is not aided by a verdict; being the case, not of a title defectively set forth, but a total defect of title.⁴

8. A surveyor is justified in executing an order of a county court, having jurisdiction, requiring him to open a

¹ Pickering v. Coleman, 12 N. H. 148.

² Flanders v. Cross, 10 Cush. 514.

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³ Wentworth v. Blanchard, 37 Maine, 14.

⁴ Bartlett v. Crozier, 17 Johns. 439.

road, though such order is irregularly made.¹ But under the statute requiring road warrants to be signed by the supervisors, a copy of a warrant signed by them, made at their request by their clerk, but not in their presence, will not justify an officer in proceeding under it.²

9. Cases may also arise, involving the rights and duties of *military officers*. (a) Thus case or trespass lies against a military officer, for a seizure of goods or arrest of the person, by virtue of a warrant for a fine, illegally issued by such officer.³ So replevin lies, for property taken by virtue of a warrant, issued by a court-martial of the United

¹ Yeager v. Carpenter, 8 Leigh, 454.

² Bixby v. Harris, 6 Fost. 125.

³ Mericle v. Mulks, 1 Wis. 366.

(a) Lord Mansfield is reported thus to have charged a jury: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong,—if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust." Per Ld. Mansfield, *Wall v. M'Namara*, cited 1 T. R. 536.

The defendant went to the place of rendezvous for the impress service, and gave information that the plaintiff, being at a certain house, was liable to impressment and a fit person for the service; in consequence of which the plaintiff was seized by the press-gang and carried on board the tender, where he was detained, until it was ascertained that he had never been before in a ship but once, which was also a case of unlawful impressment. Held, a proper case for an action of trespass and false imprisonment. Lord Ellenborough remarked: "This is not like a malicious prosecution, where the

States, to the marshal of the district, to collect a fine imposed by the sentence of the Court upon the plaintiff, as a private in the militia of the State of New York, for refusing to rendezvous and enter the service, in obedience to the orders of the commander-in-chief of the militia, &c.¹ But, where a soldier had been arrested and committed to the custody of the commandant of a garrison, who ordered him to do certain duty which was reasonable, and warranted by military usage; it was held that the disobedience of the soldier justified the officer in commanding him to be tied to a gun; and that it was a defence to an action for false imprisonment.²

10. It has been held, that an action on the case will not lie at common law against a *returning officer*, for falsely returning a candidate for a seat in Parliament.³ But, in general, case will lie for a false return in the matter of an election to an office.⁴ So an action on the case lies against the *commissioners of a lottery*, for not adjudging a prize to the holder of a ticket entitled to receive it.⁵ Or against a *postmaster* for not delivering a letter on request, though no particular damage accrued. Otherwise if the letter had been tendered, and the plaintiff would not pay the postage.⁶ So an *officer of customs* is liable in trespass for a wrong seizure of goods, and carrying them to the king's warehouses, notwithstanding probable cause.⁷ And an officer of the revenue, seizing goods as forfeited, and causing them to be libelled and tried, in an action of trespass by the owner, can only plead a

¹ *Mills v. Martin*, 19 Johns. 7.

² *Schuneman v. Diblee*, 14 Johns. 235.

³ *Prideaux v. Morrice*, 7 Mod. 14.

⁴ *Reg. v. Heathcote*, 10 Mod. 54.

⁵ *Schinotti v. Bumstead*, 6 T. R. 646.

⁶ *Edwards v. Dickinson*, 12 Mod. 6.

⁷ *Leglise v. Champante*, 2 Str. 820.

party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant, therefore, was a trespasser in procuring it to be done; nor is any proof of malice necessary." *Flewster v. Royle*, 1 Camp. 187.

condemnation, or an acquittal with a certificate of probable cause.¹ (a)

¹ *Gelston v. Hoyt*, 13 Johns. 561.

(a) Trespass does not lie against excise officers, who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found. Nor are the defendants bound to show reasonable grounds of suspicion. But case lies, for maliciously obtaining or executing the warrant. *Cooper v. Boot*, 1 T. R. 585 ; 4 Doug. 339.

CHAPTER XXIV.

JOINT TORTS OR WRONGS.

- | | |
|---|---|
| 1. Mutual rights and liabilities of parties jointly interested, as between themselves and in reference to others. | erty; possession of one, when adverse to another. |
| 2. Suit of one joint owner against another.—Sale or destruction of the property. | 5. Third person claiming under one tenant in common. |
| 3. Members of a voluntary association. | 7. Suits by and against joint parties against or in favor of third persons. |
| 4. Tenants in common of real prop- | 16. Conspiracy. |
| | 20. Election of remedies; several suits; verdict, damages, costs, &c. |

1. Having completed our view of torts or wrongs, consisting in a violation of the duties incident to *public* relations, we proceed to consider those connected with *private* relations. And one of the most obvious and frequent relations of this class, is that of a *joint* interest, claim, or liability, in connection with the subject-matter of suit. This relation may be brought in question, in suits between the parties jointly concerned, themselves, or between them, or one or more of them, and third persons.

2. It was formerly held, as a general rule, that one joint-tenant, tenant in common, or coparcener, cannot maintain trespass or trover against his companion; although he might against a stranger, unless the joint-tenancy be pleaded in abatement.¹ And the rule is still in force to the extent, that trover does not lie between joint-tenants, unless the joint property is *destroyed*,² (a) or *sold*.³ Or, that one ten-

¹ Brown v. Hedges, 1 Salk, 290.

Roston v. Morris, 1 Dutch. 173; Bar-

² Lucas v. Wasson, 3 Dev. 398; ton v. Burton, 1 Williams, 93.

Campbell v. Campbell, 2 Murph. 65; ³ 8 Barb. 585.

Leonard v. Scarborough, 2 Kelly, 73;

(a) One tenant in common in possession is not liable in trover to his

ant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it, as to amount to a destruction of it, mediately or immediately;¹ or to an exclusion of the plaintiff's right;² or render it impossible that the plaintiff should ever take and use it. Thus the conversion of a chattel, by a tenant in common, to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state; therefore it creates no right of action.³ So the secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them, and applying the proceeds to his own use, does not amount to a conversion; nor is it an unlawful act, for which the co-tenant can maintain an action at law, even although the removal has created a lien on the chattels by a third party.⁴

¹ Heath v. Hubbard, 4 E. 110.

² Allen v. Harper, 26 Ala. 686.

³ Fennings v. Lord Grenville, 1

Taunt. 241; Mayhew v. Herrick, 7 Com. B. 229.

⁴ Jones v. Brown, 28 Eng. L. & Eq. 304.

co-tenant, for his portion of the crop grown on the land. Keisel v. Earnest, 21 Penn. 90.

Where the nature of the action itself implies the continued existence of the property, and the defendant's present possession of it; the exception to the general rule stated in the text, against the right of action between joint owners, is of course inapplicable. Thus one tenant in common of a chattel cannot maintain *detinue* for such chattel against his co-tenant. Bonner v. Latham, 1 Ired. 271.

So, where several have interest in a deed, the title to the possession of it is *ambulatory*; and any of the parties interested, having possession, may retain it against the other. Foster v. Crabb, 11 Eng. L. & Eq. 521.

And, upon similar ground, where one of two joint owners of a vessel took upon himself the management, direction, and control of the whole vessel, and, by his carelessness, inattention, and negligent and improper conduct, the vessel took fire and was consumed, it was held that he was not liable to the other joint owner, even though he assumed the management, &c., without the license or consent of the other. Moody v. Buck, 1 Sandf. 304.

But if the subject-matter be actually destroyed by one tenant in common, trover will lie against him by his co-tenant. And, where one tenant in common, the defendant, forcibly took a ship out of the possession of the other, the plaintiff, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage, where it was lost; it was held to be properly left to the jury, whether the destruction was not by the defendant's means.¹ So one tenant in common of personal property has no right to *sell* the property. He can only sell his own interest; and, if he undertakes to sell the entire property, he is liable to an action of trover, at the suit of his co-tenants; or they may take the property from the possession of the purchaser.² (a) The assuming to own or sell the whole is sufficient evidence of conversion.³ So a disposition to one's "own use" is held to be a conversion, whether by a tenant in common or otherwise.⁴ More especially, trover lies by one tenant in common of a personal chattel against his co-tenant, for the appropriation of the chattel to his exclusive use, where the chattel is of such a nature as to be necessarily destroyed

¹ Barnardiston v. Chapman, 4 E. 121.

² Tyler v. Taylor, 8 Barb. 585; Permenter v. Kelly, 18 Ala. 716.

³ Wheeler v. Wheeler, 33 Maine, 347; Smith v. Tankersley, 20 Ala. 212; Weld v. Oliver, 21 Pick. 559.

⁴ Webb v. Mann, 3 Mich. 139.

(a) It has however been said, that one tenant in common of a chattel cannot maintain trover for it against his co-tenant *while the right of recaption remains*; otherwise, when that right has been put an end to by the act of the co-tenant. Thus, where a vessel belonging to part-owners was forcibly taken by the minority out of the possession of the majority, and sent upon foreign voyages, on one of which it was ultimately lost; held, that trover could be maintained. Knight v. Coates, 1 Irish, L. R. 53. See 4 E. 110.

One co-tenant, who has wrongfully sold timber from the land, cannot set up as a defence that the other had previously done so, and that the present defendant took his proportion of the price of the previous sale. Dwinell v. Larrabee, 38 Maine, 464.

by the use thereof.¹ Or where one of two joint-owners of personal property misuses it, by appropriating it to uses for which it was not designed, and refuses to apply it to the purposes for which it was held by both; or delivers it wrongfully to a stranger, for purposes inconsistent with the uses for which it was designed, and such stranger denies the title of the other, and claims the exclusive possession and ownership.² But although, if personal property held in common be sold by one of the tenants in common as if exclusively his own, the co-tenant may maintain trover against him; in case the purchaser also sells and delivers the property as his own, he may also maintain trover against such purchaser. And the measure of damages will be the value of the property at the time of the latter sale. Nor will the plaintiff ratify the sale, and waive his right to an action of trover against the defendant, by making out a bill of his proportion of the price against the defendant, and calling on him, as he had taken the property, after he had been informed it belonged to the plaintiff, to pay for it, and save himself further trouble and expense.³

3. The general rule on this subject has been applied, as between members of voluntary, unincorporated associations. Thus a member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person who take it from him.⁴ So, where the majority of a fire company, owning certain property, voted to disband, and appointed a committee to remove the property; and a minority of the company remained, and filled up the company with other persons, and then united with the new members in an action of replevin against the committee; held, the action could not be maintained.⁵ (a)

¹ *Lowe v. Miller*, 3 Gratt. 205.

² *Agnew v. Johnson*, 17 Penn. 373.

³ *Weld v. Oliver*, 21 Pick. 559.

⁴ *Holliday v. Camsell*, 1 T. R. 658.

⁵ *Taylor v. True*, 7 Fost. 220.

(a) But where an agreement was made and executed by and between cer-

4. In reference to real as well as personal estate, inasmuch as each joint owner has the same right of possession of the whole property; the general rule is, that such possession and use by one, though exclusive of itself, furnishes no ground of action against him by the other; but such possession enures to the use of the latter, unless proved to be adverse.¹

¹ 8 B. Mon. 177.

tain persons named therein of the first part, and the several members of a volunteer company of militia (of which the parties of the first part were also members) who should sign the same of the second part; by which, after reciting that the parties of the first part had purchased uniforms and equipments for the company, those parties agreed to sell the same to the parties of the second part at the cost price thereof and interest, and the several parties of the second part, each for himself, agreed to buy such uniforms and equipments, and to pay for them by annual instalments of the money severally receivable by them for the performance of military duty; and that, until such payment, the several uniforms and equipments should be and remain the property of the parties of the first part; in an action of trover for a set of uniform and equipments by the surviving parties of the first part (two of whom died before the commencement of the action) against one of the parties of the second part, who was not also one of the parties of the first part; it was held, that, as between the parties to the suit, the agreement was not void or incapable of being enforced, on the ground that the parties of the first part were also parties of the second part. *Morley v. French*, 2 Cush. 130.

Where three tenants in common constructed a basin communicating with a public canal, and laid out six lots of the width of thirty-five feet each, facing upon one side of the basin, dividing the lots between them by each taking two, and giving to each proprietor the privilege of erecting warehouses upon his lots, extending the same to the basin; and the grantee of one of the original proprietors built a pier in the basin in front of his lot, on the line between it and the lot of the grantee of another original proprietor, whereby the latter was obstructed in the convenient use of the waters of the basin, i. e. in the lading and unlading of canal boats and their passage to and from his wharf; it was held, that the owner of each lot was entitled to the use of the waters of the basin, by laying a canal boat in front of his lot, extending over in front of his neighbor's lot, when such neighbor was not occupying the basin in front of his lot in its appropriate use, and that for a permanent obstruction in such use of the waters of the basin, by the erection of a pier, an action on the case might be sustained. *Beach v. Child*, 13 Wend. 343.

One tenant cannot sue his fellow, except in case of *actual ouster*, either proved or admitted by the pleading.¹ And one cannot be ousted by the other, except by a notorious and continued possession, unequivocally hostile.² Thus, where a tenant in common mortgaged the whole estate, and remained in actual possession, and there was evidence that he did not intend to oust his co-tenant; it was held, that the mortgage did not operate as a constructive ouster, if the mortgagor's intention was not to hold adversely to his co-tenant; and that the question of intention should be left to the jury.³ And trespass does not lie by one tenant in common against another, for disturbing a temporary rightful possession.⁴ Thus one tenant in common of a saw-mill cannot maintain this action against another, for his entry into the entire common property and exclusive occupation thereof.⁵ Nor can trespass for mesne profits be maintained by one tenant in common against another, without an actual ouster.⁶ Nor will a constructive ouster, by an heir claiming the whole estate under a supposed devise, sustain an action of trespass brought against him by the co-heir.⁷ But a tenant in common of land, actually ousted or expelled from his possession by a co-tenant, may maintain trespass *qu. claus.* against him, although the defendant admits the right of the plaintiff, and offers to account.⁸ So the owner of real estate, in possession, may maintain trespass against one also in possession, and claiming title as a tenant in common with him.⁹ And although a defendant may have a right of possession as tenant in common, yet, in trespass *qu. claus.*, a plea of soil and freehold is not supported by evidence of such tenancy.¹⁰ So a tenant in common can bring ejectment, when there is an actual ouster.¹¹ The possession of one tenant in common

¹ *Halford v. Tetherow*, 2 Jones, Law, 393.

² *Peck v. Ward*, 18 Penn. 506; *Gill v. Fauntleroy*, 8 B. Mon. 177.

³ *Moore v. Collishaw*, 10 Barr, 224.

⁴ *Duncan v. Sylvester*, 1 Shep. 417.

⁵ *Porter v. Hooper*, 1 Shep. 25.

⁶ *Ibid.*

⁷ *Allen v. Carter*, 8 Pick. 175.

⁸ *McGill v. Ash*, 7 Barr, 397; *Murray v. Hall*, 7 Com. B. 441.

⁹ *Hunting v. Russell*, 2 Cush. 145.

¹⁰ *Roberts v. Dame*, 11 N. H. 226.

¹¹ *Johnson v. Swain*, Busb. 335. See *Cross v. Robinson*, 21 Conn. 379.

may become antagonistic, and exclusive of a co-tenant, and will become so, by an unequivocal and notorious denial of the right of the co-tenant, and a refusal to pay him any part of the profits.¹ And although the perception of the entire profits by one tenant in common is not, of itself, sufficient to divest the possession of his co-tenant, nor are acts of ownership by one tenant in common necessarily to be construed into acts of disseizin; yet an undisturbed and peaceable occupancy of the premises by one for nearly thirty years, under an exclusive and notorious claim of title, without any payment of rents and profits, or any acknowledgment of the right of the other, is sufficient to raise the presumption of an actual ouster. So, where one tenant in common of an equitable title, after the abandonment of possession by both, and their removal from the State, returned and made a new and distinct contract of purchase with the vendor, from whom he received a deed to himself individually, which he had duly recorded; the mere fact that he, about the same time, caused the original unexecuted contract, under which he and his co-tenant previously held, to be spread upon the record, is not sufficient to rebut the presumption of an adverse possession arising from a long-continued, notorious, and peaceable occupancy under the new purchase.² So, where a married woman, who was a parcener, united with her husband in a deed, and purported to convey the whole estate in fee in lands, and their grantee took possession under the deed, and held for more than twenty years; it was held that an ouster might be presumed, and the other parcener barred.³ (a)

¹ *Abercrombie v. Baldwin*, 15 Ala. 363; 8 B. Mon. 177.

² *Johnson v. Toulmin*, 18 Ala. 50.

³ *Gill v. Fauntleroy*, 8 B. Mon. 177.

(a) With reference to the exercise of the mere right of possession, as between tenants in common, if there be two tenants in common of a *folding*, and one by force prevent the other from erecting hurdles, trespass lies. Co. Lit. 200 b.

Where certain hay, belonging to A. and B., was deposited in the barn of B., with the consent of A.; it was held that A. had no right to break and

5. A third person may sometimes set up the title of one tenant in common, and an authority from him, in justifica-

enter the barn, for the purpose of carrying away the hay or any part of it ; and that such breaking and entering was a trespass. *Crocker v. Carson*, 33 Maine, 436.

But one tenant in common of a barn floor has no right to use force and violence to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the former then standing on the floor. *Commonwealth v. Lakeman*, 4 Cush. 597.

The following miscellaneous examples further illustrate the mutual rights and liabilities of parties jointly interested :—

One claiming a privilege in a well and pump situate in the land of another, each being bound to contribute his proportional part of the repairs, can have no action against the latter for neglect to repair, until after a request and refusal. *Doane v. Badger*, 12 Mass. 65.

One tenant in common, who has leased to his co-tenant, may distrain for the rent. *Luther v. Arnold*, 8 Rich. 24.

The subject of *waste*, as between tenants in common, (see *Waste*,) is very generally regulated by statute in the United States.

At common law, one tenant in common was not liable to his companion, either for waste or the profits of the joint estate, although he embezzled the profits or appropriated the whole to himself. *Shiels v. Stark*, 14 Geo. 429.

One tenant in common could not maintain an action on the case in the nature of waste against another, in possession of the whole, and having a demise of a moiety from the plaintiff, for cutting down trees of proper growth and age for cutting. Otherwise, if unfit to be cut. *Martin v. Knowllys*, 8 T. R. 145.

It is not a trespass for the owner of land to take away the *fence* separating it from the land of another, for the purpose of rebuilding it with other materials. *Burrell v. Burrell*, 11 Mass. 294.

In reference to this peculiar subject of ownership as between tenants in common, it is remarked : " Where the subject of the action (trespass) is a *partition fence* between the lands of two adjoining proprietors, it is presumed to be common property of both, unless the contrary is shown. If it is proved to have been originally built upon the land of one of them, it is his ; but if it were built equally upon the land of both, though at their joint expense, each is the owner in severalty of the part standing on his own land. If the boundary is a hedge, and one ditch, it is presumed to belong to him on whose side the hedge is ; it being presumed that he who dug the ditch threw the earth upon his own land, which alone was lawful for him to

tion of what would otherwise be an unlawful interference with the property. Thus a tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the co-tenant; and, in this respect, there is no distinction between the co-tenant and one entering with him, and under his authority.¹ But in some cases a third person cannot avail himself of a mere wrong or neglect, as between the tenants themselves. Thus, where one of several tenants in common, of the right to dig and remove ore from another's land, enters and digs and removes ore therefrom, the owner of the land cannot maintain trespass against him, on the ground that he did not first give notice to his co-tenants, according to the provision of a statute, of his intention to enter, &c.²

6. In regard to *creditors* of a joint owner or tenant in common, this peculiar form of ownership of course does not exempt property from a liability for debts. (a) It is to be observed,

¹ 4 Dev. & B. 246.

² Arnold v. Stevens, 1 Met. 266.

do, and that the hedge was planted, as is usual, on the top of the bank thus raised. But if there is a ditch on each side of the hedge, or no ditch at all, the hedge is presumed to be the common property of both proprietors." 2 Greenl. Ev. § 507.

(a) Where the interest of one tenant in common has been conveyed to a third person, a creditor of such tenant, who claims the conveyance to be fraudulent and void, has no legal interest in the common estate, until he has appropriated the same, or some portion thereof, to the payment of his debt, or has instituted some proceedings for that purpose. *Staples v. Bradley*, 23 Conn. 167.

A. and B. being entitled to a remainder in slave property, expectant on a life estate, a *fi. fa.* was sued out against A., and levied on some of the slaves then in his possession, by consent of the tenant for life, and the slaves were sold by the sheriff. A. then conveyed all his estate to a trustee for the benefit of his creditors. After the death of the tenant for life, in a suit brought by the trustee against A. and B. for partition, the slaves so sold by the sheriff were allotted to the trustee, the purchaser at the sheriff's sale not being a party to that suit. In an action of detinue, by the executor of the purchaser against the trustee, for such slaves; held, at the time of the levy and sale by the sheriff, the debtor had no several property in any par-

however, in reference to the rights of the party owning in common with a debtor, that, while an officer may lawfully take possession of property owned by tenants in common, by virtue of an execution against one of them, and sell the interest of that one, and deliver the property to the purchaser; he cannot lawfully sell the share of the other tenant in common, but would by that act become a trespasser, at least so far as it respects that share of the property;¹ and liable to the other part-owner in trover or trespass, at his election.²

¹ *Lathrop v. Arnold*, 25 Maine, 136; ² *Melville v. Browne*, 15 Mass. 82; *Edgar v. Caldwell*, 1 Morris, 434; *Ren-* *Ladd v. Hill*, 4 Verm. 164; *Bradley v.*
ton v. Chaplain, Stockt. 62; *Hill v.* *Arnold*, 16 Verm. 382.
Wiggin, 11 Fost. 292.

ticular slaves, and so no title passed; and the subsequent division, in the suit to which the purchaser was not a party, did not give him a legal title to the slaves so purchased. *Leslie v. Briggs*, 6 Leigh, 6.

If, pending an attachment of personal property, in a suit against a tenant in common, the co-tenant makes a division of the property, and takes one half, he is liable to the officer in trover, although the officer sells the other half, and applies all the proceeds to the execution. *Reed v. Howard*, 2 Met. 36.

Substantially the same rules have been applied to *partners* as to *tenants* in common. Where a sheriff sells the property of a partnership as the individual property of one partner, he is liable in trover to the other for his undivided share in the property, without regard to the state of the partnership accounts. *Walsh v. Adams*, 3 Denio, 125.

After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issues against the surviving partner. Held, that the creditor, by such delivery, became tenant in common of the goods with the assignees, by relation from the act of bankruptcy; and the assignees could not maintain trover against him. *Smith v. Oriell*, 1 E. 368.

After an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands. Then the solvent partner died, leaving the defendant his executor; and afterwards a commission of bankrupt was taken out against the surviving partner, and his estate assigned to the plaintiffs. Held, they were tenants in common with the solvent partner, and, after his decease, with his representatives, by relation from the act of bankruptcy, and could not therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, 1 E. 363.

But if the sheriff sells only the undivided moiety or interest of the debtor, the purchaser becomes a tenant in common with the other tenant; who cannot, therefore, maintain trespass or trover against him, the tenancy in common not being destroyed or severed by the sale.¹ So A. and B. being joint owners of carding machines, A. sold his half to C., and B. and C. agreed to work them together. Afterwards B. delivered the machines to a sheriff, who took and sold them on an execution against A. In an action of trover brought by C. against B. for his half of the machines; held, the sale from A. to C. did not sever the tenancy in common, and trover would not lie.²

7. With regard to suits brought by parties jointly interested against third persons, (a) it is held that tenants in com-

¹ *Mersereau v. Norton*, 15 Johns. 179; ² *St. John v. Standring*, 2 Johns. 468. *Fiero v. Butts*, 2 Barb. 633.

(a) Upon this subject, the following distinctions in reference to different classes of wrongs are laid down by an approved writer on pleading. It will be seen by the cases referred to in the text, that this statement presents a substantially complete and accurate view of joint rights and liabilities, in relation to the forms of proceeding:—

For injuries to the person, several persons cannot in general sue jointly, as for slander, battery, or false imprisonment. To this rule, however, there are some exceptions. (See *Slander, Libel, False Imprisonment, Partners.*) 1 Chit. Pl. 54.

In actions for injuries to personal property, joint-tenants and tenants in common must join; but parties having several and distinct interests cannot in general join; as if the goods of A. and B., the separate property of each, be unlawfully distrained, they cannot join in replevin. But though the interests be several, yet if the injury occasion an entire joint damage to several, they may in some cases join. As where two persons were severally seized of two ancient mills, at one or the other of which the defendant ought to have ground his corn, but neglected to grind at either, it was decided that both might join; and where goods are bailed to two, and only one has the possession in fact, and a stranger carries them away, both may have detinue or trespass, or the one who had actual possession may sue alone. 1 Chit. Pl. 54, 55.

In actions for injuries to real property, joint-tenants and parceners must

mon *must* join in all personal actions concerning the common property.¹ As in an action for nuisance to land.² Or, in a complaint for flowing by a mill-dam.³ And a separate possession, by several tenants in common, of the common territory, but without the intention of entirely severing the tenancy, will not prevent their joining in an action for a trespass upon one divided portion.⁴ So, where the owner of lands agrees with another, that he may sow the land on shares, they may maintain a joint action of trespass against a third person who cuts and carries away the corn.⁵ And, if two persons have an entire joint damage, they *may* bring a joint action, though their interests are several.⁶ It is said, "There seems to be no reason why different plaintiffs who have different rights should not sue the same defendant in respect of separate injuries, though arising out of one transaction."⁷ Thus different persons, owning separate tenements affected by a nuisance, may join in a suit to restrain its continuance by an injunction.⁸ So where two persons have entered lands in their individual names, and afterwards make an agreement by deed, reciting that the lands were purchased jointly "for promoting the joint interest of the parties by securing to them the timber on said lands to be sawed into plank;" the instrument will operate as a covenant, on the part of each, to stand seized to the use of the other of an individual interest in the trees growing on the lands, and will authorize the parties to maintain an action

¹ Lane v. Dobyns, 11 Mis. 105. See Boobier v. Boobier, 39 Maine, 406.

² Low v. Mumford, 14 Johns. 426.

³ Tucker v. Campbell, 36 Maine, 346.

⁴ Johnson v. Goodwin, 1 Williams, 288.

⁵ Foot v. Colvin, 3 Johns. 216.

⁶ Coryton v. Lithbye, 2 Saund. 115.

⁷ Per Best, C. J., Knight v. Legh, 4

Bing. 589.

⁸ Peck v. Elder, 3 Sandf. 126.

join in real as well as personal actions, or the nonjoinder may be pleaded in abatement. Tenants in common must in general sever in real actions; but in personal actions, as for a trespass or a nuisance to their land, they may join. A tenant in common may, however, in general, sue separately. 1 Chit. 55, 56.

of trespass jointly for an injury to the trees.¹ But an action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other. Thus, where an action was brought, and a verdict obtained, by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them; the Court ordered the judgment to be arrested.² Nor can two bring a joint action for false return to a mandamus.³ And if a joint action of trespass be brought against several persons, the plaintiff cannot declare for an assault and battery by one, and for the taking away of goods by the others; because these trespasses are of several natures.⁴ And, on the other hand, tenants in common may sue separately;—as in ejectment.⁵ Or in trespass to try title.⁶ So a part-owner of personal property, having the possession and control of it, with power to sell, may maintain trover against a wrongdoer who converts it.⁷ And one tenant in common of land, over which the county commissioners have laid out a highway, may apply for a jury to assess his damages.⁸ So, where Maine and Massachusetts jointly made a grant of land, reserving a certain quantity for the support of schools and public worship, and the State of Maine caused the reserved part to be set off by certain prescribed proceedings; it was held, that the State of Maine could maintain trespass against the grantee for cutting timber on such reserved part, although the State of Massachusetts was no party to the process by which it was set off, and did not join in the suit, or interpose any claim.⁹ So, in an action of trespass *qu. claus.*, for breaking, entering upon, and cutting and carrying away trees from land owned by tenants in common, each tenant is entitled to his several action; and it cannot be defeated by a subsequent payment to his co-tenants for the wood thus

¹ Blackburn v. Baker, 1 Ala. 173.

² Barratt v. Collins, 10 Moo. 446.

³ Butler v. Rews, 12 Mod. 349, 371.

⁴ 2 Saund. 117 a.

⁵ Hammett v. Blount, 1 Swan, 385.

⁶ Croft v. Rains, 10 Tex. 520; Hines v. Trantham, 27 Ala. 159.

⁷ Hyde v. Noble, 13 N. H. 494.

⁸ Dwight v. Hampden, 7 Cush. 533.

⁹ Hammond v. Morrell, 33 Maine, 300.

taken and carried away.¹ But it is held, that, in an action of trespass *qu. claus.* by one joint owner, he cannot recover more than his proportion of damages.² (a)

8. It is to be observed, however, that, even where an action is brought by one person, in which others should properly have been joined as plaintiffs; the objection will be waived, unless taken by plea in abatement. Thus where the general issue is pleaded, in an action of trespass *qu. claus.* brought before a justice of the peace, the plaintiff is not obliged to prove the exclusive possession.³ So one tenant in common may maintain an action against a stranger for a

¹ Longfellow v. Quimby, 29 Maine, 186.

² Jackson v. Todd, 1 Dutch. 121. *Contra*, Hibbard v. Foster, 24 Verm. 542.

³ Stone v. Hubbard, 17 Pick. 217.

(a) If a thing be deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. But where it had been agreed between the assignor and the assignee of a lease, that, to save the expense of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account; and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee, who acted as his agent,) procured an illegal and void conveyance of the property in it from the assignee; held, that the assignee, or his legal representatives, might alone maintain trover for it, after demand and refusal. *May v. Harvey*, 13 E. 197.

A. furnished B. with upper-leather to be made into boots, under a parol agreement between them that the leather should remain A.'s until paid for. B. made boots, and for a while sent them to New York to be sold by a commission merchant, who made acceptances for B. alone, and made remittances to B. alone. A parcel of boots, afterwards made by B. from upper-leather so furnished by A., were attached as B.'s property, and were subsequently sold as such on execution by the attaching officer. Held, that A. was either the owner of the whole property in the boots, or was owner in common with B., and might on either ground maintain an action of trover against the officer for a conversion by the sale on execution. *Bryant v. Clifford*, 13 Met. 188.

conversion, and recover his separate interest, if the nonjoinder is not pleaded in abatement.¹ So one of two reversioners may, during the continuance of the particular estate, maintain an action on the case for an injury to the reversion, recovering only a moiety of the damages. Unless the nonjoinder of the other reversioner is pleaded in abatement, the only effect of such nonjoinder will be to limit the damages.² (a) And even for this purpose it has been held inadmissible.³ The objection in question cannot be taken in arrest of judgment.⁴ So, after verdict and judgment, it is too late to object, that the evidence showed that the plaintiff owned the property jointly with the defendant.⁵ And, where one joint-owner would have no right of action, the other, having such right, may sue alone. Thus one tenant in common of personal property may sustain trover against an officer, for his undivided moiety, when the officer has sold the whole property upon execution against the co-tenant.⁶ And, although the action should properly be a joint one, yet if, by the pleadings, the defendant raises the issue of a joint title, or title in a third person; the plaintiff will prevail. Thus, in trover, the declaration stated, that the plaintiff was possessed as of his own property of four horses, which the defendant con-

¹ Tripp v. Riley, 15 Barb. 333.

⁴ Starnes v. Quin, 6 Geo. 84.

² Putney v. Lapham, 10 Cush. 232.

⁵ Rank v. Rank, 5 Barr, 211.

³ Zabriskie v. Smith, 3 Kern. 322.

⁶ White v. Morton, 22 Verm. 15.

(a) A joint possession of the *locus in quo*, with others, is a sufficient possession, on the part of the plaintiff, to enable him to maintain trespass *quare clausum*. Holly v. Brown, 14 Conn. 255.

Where several plaintiffs join in an action of trespass to try title, a deed, conveying the land in controversy to some of them, is admissible evidence for the grantees therein named; and, therefore, a motion to exclude it, may be refused. Lindsay v. Hoke, 21 Ala. 542.

One of several defendants in an execution may replevy property levied on, although his co-defendants do not unite with him in executing the forthcoming bond. Sheppard v. Melloy, 12 Ala. 561.

And, in general, the principle stated in the text applies to the action of *replevin*. Wright v. Bennett, 3 Barb. 451.

verted to his own use. Pleas, first, that they were not the property of the plaintiff; second, that a judgment was recovered against J. F., and that the defendant, an officer, seized them under an execution against J. F., the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff. Replication, that they were the property of the plaintiff *modo et formâ*. It was found by the jury, that they were the property of the plaintiff and J. F. jointly. Held, that the issue raised by the defendant was, whether the cattle were the sole property of J. F., and, the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover.¹ (a) So, where one tenant in common sues separately in trover, and the defendant does not plead in abatement, and the plaintiff recovers his proportion of the common property; the other tenants may afterwards sue severally for their interest, and the defendant cannot plead a nonjoinder.² So, if one tenant in common sell the whole property to a stranger, trover lies against the purchaser, in favor of the others, for their share. Such sale is void as to them, and does not make him a tenant in common with them.³ (b)

¹ Farrar v. Beswick, 1 Mees. & Wels. 682; 2 Gale, 153.

² Starnes v. Quin, 6 Geo. 84.
³ Ibid.

(a) But, in trover, where the question was, whether goods were the property of the plaintiff alone, or jointly with J. S.; held, as the plaintiff and J. S. had made joint orders for the disposition of the goods, the plaintiff alone could not recover. Nathan v. Buckland, 2 Moore, 153.

(b) It may be remarked, that where several parties, as required by law, join in a suit, a defence available against one alone will defeat the action. Thus, in trover, the plaintiffs claimed under a bill of sale from A., and the defendant, by virtue of a subsequent attachment, as a creditor of A. It appeared that the bill of sale was fraudulent and void as against the defendant, in relation to the interest of one of the plaintiffs. Held, the plaintiffs could not recover, although none but A. participated in the fraud, or had any knowledge of it. Pettibone v. Phelps, 13 Conn. 445.

Where a sheriff levies on and sells land as the property of a party, who

9. With regard to joint *liability* for torts, or actions *against* several wrongdoers; it is the general rule, that the plaintiff may sue any of those who committed the tort, and the nonjoinder of the others cannot be pleaded in abatement.¹ (a) Where an immediate act is done by the co-operation or the joint act of two or more persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all; provided, however, either that they acted in concert, (b) or

¹ *Low v. Mumford*, 14 Johns. 426.

has in fact no interest in the land, but only lives on it with the real owner; a joint action of trespass to try titles, will not lie by the purchaser, against the party as whose property the land was sold, and the real owner. The sheriff's deed, being no estoppel as against the real owner, does not, in a joint action, operate as an estoppel against the party, as whose property the land was sold. *Bauskett v. Holsonback*, 2 Rich. 624.

(a) The distinction, however, is taken, that, where the parties committing a tort are joint owners of land, and the tort consists in the omission of some act, which, as such owners, they were bound to perform; as, for instance, for not setting out tithe, &c.; all must be joined in the action, as in such case the title to realty will come in question; that is, whether the defendants, by reason of their ownership, were bound to perform the act, for the omission of which the action is brought. But if the act complained of consists in a malfeasance, as if the defendants have erected a nuisance on their land, no advantage can be taken of the nonjoinder, for in such case their title cannot come in question, and they are equally liable whether they have a right in the land or not. *Low v. Mumford*, 14 Johns. 426; 1 Chit. Pl. 78; 1 Saund. 291.

(b) The plaintiff, in an action of trespass *vi et armis*, in one count, alleging sundry wrongful acts of the defendants on one day, claimed that all the acts complained of took place on that day, in the prosecution of a concerted plan of the defendants to get the plaintiff out of the house. After the plaintiff had given evidence of an assault, by one of the defendants alone, early in the morning, she was proceeding to prove a subsequent assault by the other defendant, when the defendants objected to the latter evidence. Held, the plaintiff, under her declaration, could prove but one assault, and that, the one she had elected to prove; but, if the acts complained of were parts of a concerted plan of the defendants, as claimed by the plaintiff, the evidence objected to was proper. *Brown v. Wheeler*, 18 Conn. 199.

The declaration charged a joint assault by the defendants, to which they

that the act of the party sought to be charged ordinarily and naturally produced the acts of the others.¹ So all who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands.² So a party not personally engaged in the acts of taking, using, and disposing of the property, but who coöperated with the principal actor, by aiding and abetting him in doing these acts, and subsequently recognized and approved of them; is chargeable with the conversion. Or one who advised and assisted in the measures taken to obtain possession, and for whose benefit the acts were in part done, and who subsequently approved of and adopted them.³ And, in trespass against two, it is properly left to the jury to decide, whether there was a joint trespass, or only one, if any, guilty.⁴ And, where, in an action of trespass against two, there is any evidence from which the jury might reasonably infer the participation of one of them, it is no error to refuse to charge the jury, that they ought to find him not guilty.⁵ (a)

¹ Brooks v. Ashburn, 9 Geo. 297;
Sutton v. Clarke, 6 Taun. 29.

² Judson v. Cook, 11 Barb. 642.

³ 19 Conn. 319.

⁴ Owens v. Derby, 2 Scam. 26.

⁵ Jones v. Welch, 15 Ala. 306.

pleaded jointly not guilty, and informed the Court that this was intended to meet the declaration exactly. There was no claim by the plaintiff, that one of the defendants could be subjected for an assault by the other, unless they acted in concert. The defendants claimed, and requested the Court to charge the jury, that, if they should find one defendant guilty and the other not guilty, they should render a verdict accordingly; but the Court, in view of the matters actually in controversy, submitted the case to the jury upon the evidence, directing them only, that, if they should find the facts proved as stated in the declaration, they must return a verdict against the defendants. Held, a correct charge. Ibid.

(a) In New York, the following somewhat peculiar and local rules have been settled in relation to the action of *replevin*, brought against several defendants. To recover possession of personal property, where a taking by one is clearly proved, it is not a ground for a nonsuit generally as to all the defendants, that no joint taking by them was proved. But if nothing

So where one goes in aid of a person who commits a trespass, though he takes no further part in it, he will himself be guilty of trespass.¹ And if one sell timber upon land of another, and the purchaser cut and remove it; the seller is a trespasser.² So trespass may be maintained against a person who merely carries away the materials of a building, which has been pulled down by a trespasser.³ So in trespass against three for assault and battery; plea, *not guilty*, by all; by the third, a justification in defence of his freehold; replication, that he used more force than was necessary; rejoinder, that all the defendants did not use more force than was necessary; demurrer and joinder; held, the replication was good, and the rejoinder bad.⁴ So where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully passing thereon was accidentally struck by the ball, it was held, that they all were liable in trespass; provided, that, from the width of the road and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was such as to be likely to endanger them, and that the individual by whom the ball was thrown was acting

¹ Clark v. Bales, 15 Ark. 452.

² Dreyer v. Wing, 23 Mis. 434.

³ Woodruff v. Halsey, 8 Pick. 233.

⁴ Morrow v. Belcher, 4 B. & C. 704.

appears, either in the pleading or in the evidence, to charge a portion of the defendants, they will be entitled to a nonsuit, and the plaintiff may proceed and try the issues between him and the other defendants. And the Court may adjudge a return in favor of a part of the defendants, and refuse it as to the others. Although the jury find the exclusive possession to be in one of the defendants, they are not bound to render a general verdict in favor of all. Where, in an action to recover possession of personal property, a portion of the defendants claim the entire possession, by virtue of a chattel mortgage, in hostility both to their co-defendant, the sheriff, and the plaintiffs, and the proof shows that the sheriff levied upon the property, and held it in subserviency to the mortgage; it is not necessary that verdict should determine the value of the property admitted by the mortgagees to be in their possession. A general assessment of the whole value is all that is necessary. Woodburn v. Chamberlin, 17 Barb. 446.

in the usual manner of persons engaged in such game.¹ So where the defendant ascended in a balloon, which descended a short distance from the place of its descent into the plaintiff's garden; and the defendant, being entangled and in a dangerous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, &c.; held, that though ascending in a balloon was a lawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the garden, either from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable in trespass for all the damage done to the plaintiff's garden.² So, where one of the defendants sold a steer running at large on a prairie to the other, and agreed to point it out on request, and pointed out by mistake a steer belonging to another man, which the other defendant killed; trespass lies against both jointly; though it would be otherwise, had the steer been pointed out by one a stranger to the bargain.³ So, in an action on the case, for conspiring to prevent the plaintiff, who was about to perform as an actor at a theatre, from acquiring fame and profit by that performance, and for hiring persons to hoot, hiss, groan, and yell at the plaintiff during the performance, and for hooting, hissing, &c., together with such persons; it was proved, that, on an occasion when the plaintiff appeared as an actor, there was a great disturbance in the theatre, consisting of hooting, &c., in which the defendants took a prominent part. The plaintiff rested his case entirely on the conspiracy. The Judge left it to the jury to say, whether what took place was the result of a preconcerted arrangement between the defendants and persons in other parts of the theatre. Held, a proper direction.⁴ So, in order to constitute a joint conversion of personal property, the acts of the several defendants need not be contem-

¹ *Vosburgh v. Moak*, 1 Cush. 453.

² *Guille v. Swan*, 19 Johns. 381.

³ *Hamilton v. Hunt*, 14 Ill. 472.

⁴ *Gregory v. Brunswick*, 6 M. & G. 953.

poraneous, if their acts and purposes all tend to the same result.¹ Nor that the party should have had the exclusive control or actual *manucaption* of the goods; but the term embraces in its legal import any intermeddling with, or dominion over the property of another, subversive of the rights of the true owner. Thus if the defendants are actually present, aiding another in the unlawful design of removing the plaintiff's slaves from the State, with the intention of wrongfully depriving him of his property, even though it be for the use and benefit of his wife; each act in furtherance of the common design is the act of all, and all are guilty.² So, in trover for sheep, it was held a correct instruction, that, if the defendant was aware of the wrong of a third person, and undertook to aid him to secrete the sheep and keep them from the true owner; or if the defendant had been indemnified, before the suit was commenced, for withholding the sheep from the true owner, and preventing her from enjoying her property; or confederated with other parties for that purpose, and did withhold the sheep; then they should find the fact of conversion by the defendant.³ So, where the managing partner, conducting the business of the defendants, a mining concern, refused to deliver up ore belonging to former tenants of the mine, on the ground that it belonged to the firm, and there was a subsequent offer from the attorney of the defendants to deliver up tools that were in the same building with the ore, but not the ore; held, trover would lie.⁴ (a) So, where a consignee, with power to sell, sells with intent to defraud the consignor, which intent is known to the purchaser; the seller and buyer are jointly

¹ Cram v. Thissell, 35 Maine, 86.

⁴ Lloyd v. Bellis, 37 Eng. L. & Eq.

² Freeman v. Scurlock, 27 Ala. 407. 545.

³ Scott v. Perkins, 28 Maine, 22.

(a) Trover will lie against different individuals for successive conversions of the same property. But the plaintiff can receive but one satisfaction. A satisfied judgment, therefore, is a bar to an action for the conversion of the same property. *Matthews v. Menadger*, 2 McLean, 145.

liable in trover.¹ So, A.'s horse having been stolen, B. shortly afterwards bought it *bonâ fide* at a repository for the sale of horses, and then sent it for sale to another repository kept by C. A., having demanded the horse of C., was referred by him to B. as the owner. B., when applied to, refused to give it up, and A. again demanded the horse in the presence of B. and C., offering them an indemnity, when they both refused to deliver it up. Held, that such refusal was evidence of a conversion by both B. and C.²

10. But, as already suggested, although, if an act be done by the coöperation of several persons, all are trespassers, and all may be sued jointly, or one is liable for the injury done by all; yet it must appear that they acted in concert, or that the act of the one sued naturally and ordinarily produced the acts of the others.³ Where two parties act, each for himself, in producing a result injurious to the plaintiff, they are not jointly liable.⁴ Thus a person, to be liable as a joint trespasser, in an assault and battery, where he was not present, must be proved to have done something which led directly to the commission of the offence by another.⁵ So although, under a declaration in trespass, that the defendants on a certain day, and on divers other days and times, between that day and another day specified, broke and entered the plaintiff's barn, and took and carried away his hay; the plaintiff may recover for as many distinct acts of trespass, as he can prove were committed by the defendants between the days mentioned; yet, if he proves several distinct acts of trespass, in some of which a part only of the defendants were concerned, he can only recover against all the defendants for those acts in which all participated.⁶ (a) So a hirer of a slave, and

¹ White v. Wall, 40 Maine, 574.

² Lee v. Robinson, 37 Eng. L. & Eq. 406; Lee v. Bayes, 18 Com. B. 599.

³ Guille v. Swan, 19 Johns. 38.

⁴ Bard v. Rohn, 26 Penn. 482.

⁵ Bird v. Lynn, 10 B. Mon. 422.

⁶ Myrick v. Downer, 18 Verm. 360.

(a) Where the defendants took from the plaintiff at the same time

one who intermeddles with the slave and puts him in jeopardy so that he is fatally injured, are not jointly liable to the owner.¹ So in trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all. Therefore, where the plaintiff brought trover for goods against A. and B., bankrupts, and C. and D., their assignees, and proved that the bankrupts, before the bankruptcy, received, and afterwards disposed of the goods by way of pledge, having no authority so to do; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand; and the jury found all the defendants guilty, there being only one count in the declaration: held, the evidence did not warrant such finding.² So where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and for no more. And, in the absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage.³ So, where several are engaged in the accomplishment of a lawful object, as in assisting one of them to abate a nuisance on his land; and one or more only commit a trespass in accomplishing this end; the others are not liable therefor.⁴ So, where property acquired by a trespasser comes into the possession of another, who sells it, he is not liable in trespass, unless he knew that it was wrongfully obtained, or unless it was obtained for his use by his servant, or unless he assented

¹ *Hawkins v. Haythorn*, 8 B. Mon. 515.

² *Partenheimer v. Van Order*, 20 Barb. 479.

³ *Nicoll v. Glennie*, 1 M. & S. 588.

⁴ *Richardson v. Emerson*, 3 Mis. 319.

several negroes, each claiming and keeping possession of a distinct portion of them as his own; the plaintiff cannot maintain a joint action of detinue against them, though it seems he might have a joint action of trespass. *Slade v. Washburn*, 2 Ired. 414.

to the trespass. But he is liable in detinue or trover.¹ And a person who knowingly receives from another a chattel, which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.² So, where A. took and converted the mule of the plaintiff, and sold it to B.; and the plaintiff brought replevin in the detinet against B., and recovered, and then sued A. for the trespass, to which A. pleaded the former recovery; held, on demurrer, that the plea was not good, the original taking by A., and the detention by B., being separate causes of action.³ So, where A. allows B. to use his horse and wagon and barn, for getting in and threshing grain, the title to which is in dispute between B. and C.; this does not implicate A. as a trespasser.⁴ So, where the defendant, a chemist, was in the habit of filling a soda fountain for A., who rented it with another fountain from the plaintiff, and A. absconded, leaving the fountain in the possession of the defendant; this is not a tortious conversion by the defendant.⁵ So, in an action of assault and battery brought by A. against B., and C., who was B.'s bookkeeper and relative, it appeared that A. came to the house of B., to settle certain debts, and for which the latter agreed to take one fourth as a composition. A., B., and C. were in B.'s office, engaged in this arrangement for some time, when B. was called to his shop, adjoining the office, to a customer, and soon after, an altercation having arisen between A. and C., C. committed the assault complained of, which lasted twenty minutes. It appeared, that there was no cause of quarrel immediately between A. and C.; that the dispute arose altogether out of the settlement; that the shop was only separated from the office by a glass door, which was partly open, and from which C. called

¹ *Justice v. Mendell*, 14 B. Mon. 12. ⁴ *Heitzman v. Divil*, 11 Penn. 264.
² *Wilson v. Barker*, 4 B. & Ad. 614. ⁵ *Parkerson v. Simons*, 2 M'Mullan, 188.
³ *McGee v. Overby*, 7 Eng. 164.

for a rope to hang the plaintiff, which was thrown to him by a person in the shop; and there was great reason to infer that C. could hear, if not see, nearly all that occurred in the office. The Judge charged the jury, that, if C. ordered the assault, or encouraged it, or expressed approbation of it, or gave countenance to it, or did anything to adopt it as his own, they should find a verdict against him; but added, he should be surprised if they found against C. The jury found for C. On motion to set this verdict aside, for misdirection, and as against law and evidence; held, the question for the jury was left correctly to them in the preliminary part of the charge; and, although the Court disapproved of the succeeding strong expression of opinion, that it did not amount to a misdirection, or afford ground for setting the verdict aside. Also, that the verdict was not against the weight of evidence.¹ So, where the bailee of a horse sold it, as his own, to an infant, and, the owner demanding the horse of the vendee, his father advised him to retain it till he had made further inquiry; it was held, that the father was not liable, as one who had advised or given countenance to the continuation of the unlawful detention.² So, to maintain *trover* against two bailees, a demand of and refusal by one is not sufficient; a conversion by both must be shown. (a) But the question whether a joint conversion is proved is for the jury. Thus, W. and R. having hired of M. a number of cows for a year, W. took possession of and kept them on his farm, several miles distant from R.'s residence. A few months after the hiring, the cows were sold under an execution against W., issued upon a void justice's judgment. At the expiration of the year, the cows being still in W.'s possession, M. demanded them of him, and he refused to de-

¹ Treaner v. Campbell, 3 Irish, L. R. 387. ² Sartin v. Saling, 21 Mis. 387.

(a) Otherwise in the case of *partners*, each being the general agent of the other. 4 Hill, 13.

liver them up. A like demand was made of R. at his residence, who said "he would have nothing to do with the matter," and refused to go and see W. on the subject. Held, in trover against W. and R., that, whether enough had been shown to prove a conversion by R., was a question for the jury, and the Judge could not properly order them to find a conversion by both; that if R.'s refusal to act proceeded from an honest desire to avoid the litigation which he supposed might arise from the sale, he was not guilty of a conversion. Otherwise, if his refusal proceeded from a design to aid or countenance W. in unlawfully withholding the cows, or to embarrass the latter in his endeavor to obtain possession.¹ And the liability of several persons for the act of one has been qualified by the consideration that their participation was through mere *mistake*. Thus, where two buy land, A. to own the land, B. to have the timber upon it; and B., mistaking his bounds, cuts down timber on an adjoining lot; A. is not liable in trespass, unless he either induced it or was benefited by it.² So a *contract* between joint defendants may sometimes be shown, to disprove their joint liability. Thus, in trover against two defendants, for a horse hired of the plaintiff to go to a certain place, it is competent for the defendants to prove, that, by a contract between them, one was to carry the other to such place as a passenger; there being no direct evidence of any express hiring by the latter.³ And a party, though jointly liable, may sometimes be held liable only for a portion of the property wrongfully taken. Thus, where one tortiously cuts and carries away trees from another's land, and sells a part of them to one who has no knowledge of the tort, the owner of the trees, even if he can maintain an action against them jointly, can recover of the purchaser only the value of the part of the trees purchased by him.⁴

¹ Mitchell v. Williams, 4 Hill, 13.

³ Adams v. Graves, 18 Pick. 355.

² Langdon v. Bruce, 1 Williams, 657.

⁴ Moody v. Whitney, 34 Maine, 563

11. Upon the grounds above stated, where, in an action of trespass against several defendants, who jointly plead not guilty, a joint trespass is proved, the plaintiff cannot give in evidence, in aggravation of damages, the distinct and unconnected acts of some of the defendants.¹ So, where the plaintiff, in an action of trover against B. and C., introduced evidence proving a conversion by B. only, without the participation or knowledge of C.; it was held, that it was not then competent to the plaintiff to prove a distinct conversion by C.² So, in trespass against several defendants, if a joint trespass is proved against part of the defendants only, evidence cannot afterwards be given of another trespass by all even against such part alone.³

12. The principle of joint liability has often been applied in reference to *officers*, acting in the execution of process. (See chap. 20.) When the original act of an officer, in the execution of civil process, is unlawful, those aiding him in the performance of it will be trespassers, though they act by his command. As where a sheriff arrested a debtor on execution, by breaking open the outer door of his dwelling-house.⁴ So the removal and retention of the personal property of a stranger, by an officer acting by direction of the party, is a conversion by both, aside from any demand and refusal.⁵ And where the goods of one person are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass.⁶ So, if a sheriff has wrongfully attached property, and, while the property is in his possession, wrongfully attaches it by virtue of a second writ of attachment, by direction of the creditor in such second suit; the owner of the prop-

¹ Higby v. Williams, 16 Johns. 74.

⁴ Hooker v. Smith, 19 Verm. 151.

² Forbes v. Marsh, 15 Conn. 384.

⁵ Calkins v. Lockwood, 17 Conn.

³ Pritchard v. Campbell, 5 Ind. 154.
494.

⁶ Ferrin v. Clafin, 11 Mis. 13.

erty may maintain trespass against the officer and the second attaching creditor jointly.¹ And where two creditors sue out separate writs of attachment against the same debtor, and put them into the hands of the same officer, who serves them at the same time, by attaching upon them the same property; they are *prima facie* jointly concerned in the taking of the property, and must be so holden, in an action of trespass brought against them and the officer for such taking; but it is competent for either of the defendants to show that he had no concern in the taking, or that the taking on the two writs was at different times.² So, where the president of a bank, at whose suit an attachment had been issued, and levied on the property of the defendant, when applied to by the constable in regard to selling the property, told him to do his duty; and directed the attorney of the bank to examine the question, and the facts, in relation to a prior lien upon the goods, and to act upon his judgment; whereupon the attorney instructed the constable to sell the goods; and the president of the bank attended the sale and bid off part of the property: held, that this was sufficient to connect the president with the taking or detaining of the goods, and that he was liable in an action therefor.³ And in an action of trespass against an officer and the plaintiff in an execution, for illegally selling property under it, it is not error to instruct the jury, that they may look to the facts, that the latter was the plaintiff in the execution, and that he had just before the sale delivered to the officer a blank paper, with his signature thereon, as circumstances, in connection with the other proof, tending to show that the sale was made under his directions.⁴ More especially where property taken on execution is claimed, if the constable take a bond of indemnity from the plaintiff, and sell the property, which bond is void; they are joint trespassers.⁵ And even the sureties in a bond of indemnity,

¹ Cox v. Hall, 18 Verm. 191.

² Ellis v. Howard, 17 Ib. 330.

³ Judson v. Cook, 11 Barb. 642.

⁴ Jones v. Welch, 15 Ala. 306.

⁵ Murray v. Ezell, 3 Ala. 148.

given to a sheriff, to procure the sale under execution of property belonging to a party other than the defendant in the execution, are held liable as trespassers.¹ So the principal and surety in an indemnity bond are liable, though the property was sold after satisfaction of the execution by a sale of other articles.² So persons concerned only as appraisers in making a wrongful replevin are trespassers.³ And, upon the same principle, if one of two judgment debtors, who knows that the judgment has been paid, procure a *fi. fa.* to issue on the judgment, and assist in its execution on the other's goods; he is liable in trespass.⁴ So a justice of the peace, who issues an execution against the body of a debtor, and an attorney, who procures such execution to be issued, and causes the debtor to be arrested thereon, in a case in which both know that the law prohibits such arrest, or the issuing of such an execution; are jointly liable to the debtor in trespass.⁵ So, in Indiana, a justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute, and the party who procures such writ to be issued without first filing the bond, are trespassers, and as such liable to the party injured.⁶

13. The *party* to a wrongful process may be sued without the officer. Thus trover lies against a taker in execution of a bankrupt's goods, without joining the officer.⁷ So a third person, aiding an officer, is thus liable. Thus one who officiously accompanied a sheriff, to aid in executing a *fi. fa.* unnecessarily, at a late hour of the night, and who, against the will of the party rightfully in possession of the property, entered his house without the command of the officer, aroused, alarmed, and insulted his family, and forcibly took

¹ Wetzell v. Waters, 18 Mis. 396.

² Herring v. Hoppock, 1 Smith, 409.

³ Leonard v. Stacey, 6 Mod. 69.

⁴ Glover v. Horton, 7 Blackf. 295.

⁵ Sullivan v. Jones, 2 Gray, 570.

⁶ Berkeloo v. Randall, 4 Blackf. 476.

⁷ Rush v. Baker, 2 Stra. 996.

the property therefrom, was held to be a trespasser, without justification or excuse.¹

14. Persons summoned by an officer to assist in the execution of legal process are justifiable in their acts, at least to the same extent that the officer would be.² Thus a person acting in aid of an officer in making an arrest is justified in using such force as may be necessary to overcome resistance; if he uses more, he becomes a trespasser, and must, if led astray, in the opinion of the jury, by his own judgment, be responsible for the consequences.³ And, on the other hand, where one has property upon the premises of another, he may enter peaceably and take it, although he enter with an officer who has a writ of replevin which is not returned.⁴

15. The rule, that joint defendants must have participated in the same act, is applicable to the case of officers. Thus A. sued out an attachment against B., and the sheriff was directed to levy it on one half of a boat and cargo, belonging jointly to B. and C. A.'s son was present at the levy, and the sheriff took the whole boat and cargo, and forbade C.'s interfering with them. Held, in an action of trespass against the sheriff and A. jointly, that, while the attachment was a justification of the taking of all B.'s interest, yet A. and the sheriff should not be jointly convicted, for A. was not liable for the sheriff's acts in seizing property upon which no levy was directed, and the sheriff was not liable for A.'s trespass in suing out the attachment, or directing a levy on B.'s property.⁵

16. In this connection, we may properly speak of *conspiracy*; a wrong, which, from its very nature, can be committed only by more persons than one, and, by reason of the aggravation and capacity for mischief attaching to this peculiarity, is ordinarily made the subject of *indictment*, though it may also be the ground of civil action.

¹ McElhenny v. Wylie, 3 Strobb. 284.

⁴ Allen v. Feland, 10 B. Mon. 306.

² Payne v. Green, 10 S. & M. 507.

⁵ Clay v. Sandefer, 12 B. Mon. 334.

³ Murdock v. Ripley, 35 Maine, 472.

17. A conspiracy is not actionable, unless it affect some *legal right* of the party who brings the action. Thus the defendants, after a will had been made and executed, devising real estate to the plaintiff, conspired with each other, to induce the testator to revoke it, and effected their object by means of false and fraudulent representations. Held, the plaintiff could not maintain an action, as the revocation of the will merely deprived him of an expected *gratuity*, without interfering with any of his rights.¹ But a declaration in an action against two, for maliciously conspiring to injure the plaintiff; as, for example, to have him indicted for perjury, need not set out any agreement to do any act in itself unlawful, or any act, lawful in itself, by unlawful means.²

18. An action for a conspiracy has been held to lie in favor of a creditor, against his debtor, and a third person, who have procured the property of the debtor to be attached upon a suit on a fictitious debt, and applied to the payment of the judgment obtained in the action, in order to prevent creditors from obtaining payment out of the property; the creditor having subsequently attached the same goods, and not being able to procure payment of his debt, in consequence of the prior attachment, and the debtor being insolvent. Thus C. and G., partners, being in failing circumstances, G. made a note in the name of the partnership, for \$1,500, to P., it being agreed between G. and P. that the stock of C. and G. should be attached on the note, and the proceeds of the attachment applied ratably to the payment of the debts of G. and of C. and G. The attachment was accordingly made, and A. & Co., creditors of C. and G., subsequently, on the same day, attached the same stock in a suit for their debt. The object of the suit of P. was explained, at a meeting of some of the creditors of G., and of C. and G., on the same day, one of the firm of A. & Co. being present. P. afterwards obtained judgment on the note, and seasonably levied his execution on the attached property, which was not sufficient

¹ *Hutchins v. Hutchins*, 7 Hill, 104. ² *Parker v. Huntington*, 2 Gray, 124.

to satisfy the judgment, and distributed a part of the proceeds ratably among creditors of G. and of C. and G., and tendered A. & Co. a like percentage of their debt, which they refused to take. A. & Co. afterwards obtained judgment in their action, and took out execution, and delivered it to the officer who made the attachment, but not until thirty days from the time when their judgment was obtained. The officer returned it unsatisfied. In an action, brought by A. & Co. against G. and P., for a conspiracy to prevent A. & Co. from obtaining payment of their debt out of the property of C. and G., who still remained insolvent; it was held that the action lay, without proof of any moral fraud on the part of G. and P.; that the proceedings, in the suit on the note by P. against C. and G., were a fraud on all creditors of C. and G., who did not assent to them; that the action was not defeated, by A. & Co.'s not delivering their execution to the officer within thirty days, as he had nothing in his hands on which to levy; and that A. & Co. might maintain this action, whether the debt to them from C. and G. was payable or not at the time of their bringing the action against C. and G., on which the attachment was made.¹ But it has been also held, that an action on the case, for the fraud of the defendant, in combining with the plaintiff's debtor, in attaching all the personal property of the debtor for the benefit of the debtor, and concealing the same, in order to prevent the plaintiff from enforcing the payment of his debt, cannot be sustained; but the proper remedy is either to attach the property fraudulently held, or charge the defendant as trustee, or seek aid in a court of equity, or pursue the defendant personally under the statute, for being a party to a fraudulent judgment or fraudulent sale.² But, where a New York merchant purchased goods from a dealer in Providence, to the amount of \$6,000, upon credit, and assigned them without consideration, by a clear bill of sale, and the assignee removed them to Providence,

¹ *Adams v. Paige*, 7 Pick. 542.

² *Hall v. Eaton*, 25 Verm. 458.

where they would be free from attachment, and sold them there, saying that he intended, with the proceeds of sale, to pay the creditors of the merchant in New York, whose claims he had guaranteed, but refusing to give a list of the creditors, and the merchant also refused to show his books or make any exhibit of his affairs; held, the merchant and his assignee were not liable in an action of conspiracy, if the goods were taken to Providence, with a *bona fide* intent to sell them for the benefit of creditors; but, if their intent was to secrete them, or to compel the Providence creditors to a compromise upon their own terms without making an exhibit of the affairs of the debtor, they were guilty of a conspiracy.¹

19. The general principle applies in case of alleged conspiracy, as in case of other joint wrongs, that there must be proof of participation in the same wrongful acts. (a) Thus

¹ Whitman v. Spencer, 2 R. I. 124.

(a) In a special action on the case for fraud, by a conspiracy between the defendant and a deputy sheriff, evidence that the defendant had applied to another deputy sheriff to commit the same fraud is inadmissible. *Handley v. Call*, 27 Maine, 35.

In an action on the case against A. and B., it was alleged that A. was indebted to the plaintiff; that the two confederated and conspired together, to prevent the plaintiff from obtaining security for, or payment of his debt; that, in pursuance of such purpose and intention, and in order to enable A. to take the poor debtor's oath, the defendants caused his property to be removed from his own custody and possession into the possession of B., by whom the same or the proceeds thereof were kept secreted from attachment; that the plaintiff sued out a writ against A. to recover the debt, and caused his body to be arrested; that he took the poor debtor's oath and was discharged from arrest; and that the plaintiff entered the suit and recovered a judgment, which remained wholly unpaid. The plaintiff gave evidence of everything alleged, except the conspiracy, of which there was no direct proof. Held, the action could not be maintained. *Welling-ton v. Small*, 3 Cush. 145.

But an action for deceit in a sale may be maintained against two persons jointly, if they both knowingly make false representations at the time of the

proof that a magistrate, a prosecutor, and a constable, each behaved improperly, will not support a charge of conspiracy in instituting and conducting a malicious prosecution.¹ So, where the plaintiff charged a conspiracy to cheat and defraud him, whereby the defendants fraudulently obtained from him a conveyance of a certain tract of land to one of them; and prayed that the conveyance might be cancelled and the title to the land be adjudged to him; it was held, that a mere participation in the fraud, practised by the defendant to whom the conveyance was made, was not, of

¹ *Newall v. Jenkins*, 26 Penn. 159.

sale, though they had not previously conspired or agreed to make such representations, and though only one of them was interested in the expected fruits of the fraud. *Stiles v. White*, 11 Met. 356.

With regard to the pleading and evidence; in an action on the case for a conspiracy to defame, by spreading false statements that the plaintiff had cheated and defrauded a third person, (the words not being actionable,) and also by composing a libellous written statement to the same effect; the declaration, need not aver special damage. *Hood v. Palm*, 8 Barr, 237.

Nor, in a count for a conspiracy to defame, by reporting and charging the plaintiff to have been guilty of a crime, is it necessary to aver that the reports and charges were made falsely and maliciously, nor to set forth the words spoken. *Haldeman v. Martin*, 10 Barr, 369.

Where a conspiracy to defraud the creditors of an obligor, between the obligor and a third person, the obligee, is alleged, the whole transaction may properly be left to the jury, to connect the obligee with the original scheme; and such evidence, in connection with the acts of the obligee, is sufficient to shift the burden of proof upon the latter. And when such a conspiracy has been proved, it may be shown that the obligee engaged in it subsequently, without proof of express declarations or flagrant acts of participation. If it appear that the obligee was to be a principal actor in the execution of the plot, and he performs the part assigned to him, by arriving at the house of the obligor, who was his brother, making a formal settlement with him, and receiving the bond, which is entered up just in season to take precedence of the other creditors who were then preparing to seize upon the property of the obligor, the facts are proper to be left to the jury, as circumstantial evidence of collusion. *Bredin v. Bredin*, 3 Barr, 81.

itself, sufficient to render the other defendants liable to be joined in the action, and that the petition showed no cause of action as to them.¹

20. Under some circumstances, the person injured has the right of *electing*, whether to proceed against one party in one form of action, or against several parties jointly liable in another form. (a) Thus an action on the case lies against three proprietors of a stage-coach, upon a declaration that the coach was under their care, and that through their negligence the coach ran against the plaintiff, and injured him; the evidence being, that one of the defendants was driving, and the jury having found that the accident was occasioned by his negligent driving; although, it seems, the plaintiff might have maintained trespass against the driver.² (b) But although, in case of a joint trespass, the plaintiff may sue the trespassers jointly or separately; and a judgment against one, without satisfaction, is no bar to an action against another; yet the plaintiff can have but one satisfaction, except for costs, and, if he sues separately, must elect between the verdicts. He may elect from the more solvent or the larger judgment.³

21. It is stated in a work of authority,⁴ that, where separate actions have been brought against several defendants

¹ Johnson v. Davis, 7 Tex. 173.

² Page v. Freeman, 19 Mis. 421;

³ Moreton v. Hardern, 6 Dowl. & Ry. 275; 4 B. & C. 223.

Knott v. Cunningham, 2 Sneed, 204.

⁴ 1 Chit. Pl. 79.

(a) A similar right of election sometimes applies to the plaintiff in the suit. Thus, where goods have been levied upon and left in the possession of the owner, he may maintain trespass for their removal, as well as the sheriff, and a recovery by one will oust the other. *Browning v. Skillman*, 4 Zab. 351.

(b) But to an action on the case, in the form of tort, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners are not sued. *Powell v. Layton*, 2 New Rep. 365. See vol. i. p. 37.

for the same single act of trespass, the party last sued may plead the pendency of the first in abatement. And a recovery, against one of several parties to a joint tort, frequently precludes the plaintiff from proceeding against any other party not included in such action. Thus, in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in a field, where several persons are concerned, the recovery against one will be a bar to an action against the others. And in these cases the Court will, in general, on a summary application, stay the proceedings in the second action, where it is manifest that the entire damages have been recovered in the first. (a) Thus, in an action for assault and battery, committed by several; a recovery against one may be pleaded in bar to an action for the same battery brought against another.¹ So, it seems, a judgment in trespass *de bonis asportatis*, not satisfied, is a bar to an action against a co-trespasser.² So the assignees of an insolvent debtor brought a bill in equity, to set aside conveyances of property made by the debtor to the defendants, as made and taken either without consideration and in fraud of creditors, or by way of unlawful preference, contrary to the insolvent laws, charging the defendants, in the common form, with combining and confederating with divers other persons to the plaintiffs unknown, and praying for relief against the defendants jointly and severally; and the Court, after a hearing upon the merits, decreed that the demands, set up by the defendants in their several answers, were justly due them from the insolvent, and that the conveyances

¹ Smith v. Singleton, 2 M'Mullan, 184. ² Campbell v. Phelps, 1 Pick. 62.

(a) On the other hand, a party, against whom a judgment has been rendered on a verdict, cannot, while the judgment remains in force, maintain an action against the other party jointly with others, alleging that said verdict was unjust and false, and was procured by them by fraud and perjury, and by a conspiracy to effect that purpose. He is estopped by the judgment. Dunlap v. Glidden, 31 Maine, 435.

of property in payment thereof were not made in violation of the insolvent laws, and dismissed the bill. Held, that this decree was a bar to an action of trover by the assignees, for the same property, against one of the defendants in the suit in equity.¹ But a judgment in trover, without satisfaction, against one trespasser, is no bar to an action against another person, for a distinct trespass upon the same property, committed at a different period, and not jointly, although a writ of execution may have issued upon the judgment.²

22. With regard to the respective liabilities of defendants *in the same action*, it has been considered a doubtful point, whether, if the plaintiff, in an action, commenced against several tort-feasors, accept a sum of money from one of them, he can afterwards sue another for the same wrong.³ But if one of several defendants in an action of trespass, is arrested on a *ca. sa.*, and discharged by the plaintiff or by his consent, it is held that the Court will discharge the others from custody, and order satisfaction to be entered of record, upon their stipulating to bring no action on account of their arrest and imprisonment.⁴ (a) And, where several defendants sever in their pleadings, and separate verdicts are found against them, if the plaintiff remits damages as to some of the defendants, judgment cannot be entered up against them, for damages found against a co-defendant.⁵

¹ Bigelow v. Winsor, 1 Gray, 299.

² Hopkins v. Hersey, 7 Shep. 449.

³ Warden v. Bailey, 4 Taunt. 88.

⁴ Allen v. Craig, 2 Green, 102.

⁵ Golding v. Hall, 9 Pont. 169.

(a) It has been held, that where a joint judgment is fully paid by one defendant, it cannot be kept alive for his benefit against another. Thus one of two judgment debtors paid the amount of the judgment, but, instead of the execution being returned satisfied, it was, with the consent of the creditors, returned unsatisfied, and an alias execution taken out, upon which the other judgment debtor was committed, with the view to compel him to contribute his share of the debt for the relief of him who had made the payment. Upon *audita querela*, it was held, that the alias issued improvidently, and that the imprisonment under it was unlawful. *Bracket v. Winslow*, 17 Mass. 153.

23. Inasmuch as the liability of several persons for the same tort is originally separate as well as joint, it does not lose this character by the mere commencement of a joint action against them; but such action may proceed to different results with regard to the different defendants. Thus, in trespass *qu. claus.*, it is competent for the jury to acquit one defendant and find the other guilty, and assess damages against him.¹ (a) So in an action in tort against six, the plaintiff may recover a verdict against two.² And the same rule prevails, although the tort also involves a breach of contract, if the action is substantially in tort. Thus, in an action on the case in the King's Bench, against ten defendants, the plaintiff declared, that, before and at the time of the grievances complained of, they were proprietors of a stage-coach for the conveyance of passengers for hire from A. to B., and they received the plaintiff as an outside passenger, to be safely conveyed thereon from A. to B. for hire; and by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was overset; by means whereof the plaintiff was hurt, and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favor of the other two, and judgment being entered accord-

¹ Blackburn v. Baker, 7 Port. 284.

² Cooper v. South, 4 Taunt. 802.

(a) But it is held error for the Judge, after the issue is made up, and a jury sworn, to order the jury, at the instance of the plaintiff, to find a verdict of acquittal as to one of the defendants. *Eareart v. Smallwood*, 5 Mis. 452.

An action of ejectment was brought against five defendants, who entered into the consent rule jointly, and pleaded jointly. They severally possessed the premises in separate parts; and, the jury having found each defendant separately guilty as to the part in his possession, and not guilty as to the residue, judgment was rendered accordingly. *Jackson v. Woods*, 5 Johns. 278.

ingly; held, that, as the action was founded on a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber in error.¹ But, where several defendants in trespass plead one plea, and a joint verdict and damages are found against all, judgment must be rendered jointly against all. And if the verdict be set aside as to part, no judgment can be rendered against the others.² Though, where part are acquitted and part found guilty, setting aside the verdict as to the latter does not affect its validity as to the former.³

24. In trespass against several, a general verdict for the plaintiff is equivalent to finding all the defendants guilty.⁴ And in an action of trespass against four, where the case is submitted to the jury as to all the defendants, a verdict of guilty against three, assessing the damages, is good, though it does not find the fourth not guilty.⁵ So a declaration alleged that both of two defendants committed the assault. Each separately pleaded *non cul.*, and that the plaintiff committed the first assault upon one of the defendants, who was the father of the other, upon all which pleas issue was joined. The verdict was, that "as to first issue, the defendants are guilty of the premises within charged upon him, in manner and form as the plaintiff hath within alleged," and, "as to the other issue, that the defendants, of their own wrong, and without any such cause as they within by pleading hath alleged, assaulted the plaintiff, in manner and form as he hath within alleged." Held, a substantial finding by the jury on the matter in issue, and sufficient to support a final judgment in favor of the plaintiff.⁶ So, where there are several pleas in replevin against two, and a verdict on one

¹ Bretherton v. Wood, 6 Moo. 141.

² Cunningham v. Dyer, 2 Monr. 50.

³ Brown v. Burrus, 8 Mis. 26.

⁴ Sutliff v. Gilbert, 3 Ham. 405 ;
Cane v. Watson, 1 Morris, 52.

⁵ Wilderman v. Sandusky, 15 Ill. 59.

⁶ Mitchell v. Smith, 4 Md. 403.

for one of the defendants, and a judgment for a return of the property in favor of both, this judgment, though informal, cannot be taken advantage of by the plaintiff.¹ But it is held, that, in a joint action of trespass against several defendants, there cannot be a nonsuit as to one, and a verdict against others.²

25. The principle of *severance*, however, is held not to apply to *the award of damages*, (a) although all the defendants may not be equally culpable.³ But it is held, that, when a joint trespass is proved, the jury are to estimate the damages according to the amount in their opinion *the most culpable* ought to pay.⁴ So in trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and a joint judgment.⁵ The plaintiff is entitled to a joint verdict; and, if the damages are severed and apportioned, he may set aside the verdict and have a *venire de novo*, or enter a *nol pros.* against all but the one whom he elects to charge, and have judgment entered against him.⁶ And the law does not require the Court to allow separate trials, or to direct a separate assessment of damages.⁷ The former is matter of discretion with the Court.⁸ But the contrary doctrine has been held, that, in trespass for assault and battery against several defendants, who pleaded jointly not guilty, a verdict might be found for several damages.⁹ And, in trespass *qu. claus.* against several, where the evidence was of three distinct trespasses, each of

¹ Gotloff v. Henry, 14 Ill. 384.

² Revett v. Browne, 2 Moo. & P. 12.

³ Eliot v. Allen, 1 Com. B. 18.

⁴ Clark v. Bales, 15 Ark. 452.

⁵ Gerrish v. Cummings, 4 Cush. 391.

⁶ Layman v. Hendrix, 1 Ala. 212.

⁷ Allen v. Craig, 1 Green, 294; Johnson v. Hannahan, 3 Strobb. 425.

⁸ Sawyer v. Merrill, 10 Pick. 16.

⁹ Bevin v. Linguard, 1 Brev. 503;

Chapman v. House, 2 Str. 1140; Henry

v. Lennett, 3 B. Mon. 311.

(a) If *separate suits* be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have only one satisfaction; and he may elect *de melioribus damnis*, and issue his execution against one of the defendants; and the others must pay the costs of the suits against them respectively. *Livingston v. Bishop*, 1 Johns. 290.

which was committed jointly by some of the defendants only, (all of them being on the close at the same time,) and part of them were defaulted, and part pleaded not guilty ; it was held that the damages for each trespass were rightly assessed jointly against those who jointly committed it ; and the damages for the several trespasses were rightly assessed severally. In such case, the costs are to be taxed, and execution issued therefor jointly, against all the defendants, and several executions for damages.¹ So, when two are sued jointly for trespass upon land, and the declaration alleges joint trespasses on certain days, there may be a verdict against both jointly, and a joint assessment of damages for trespasses in which they united ; but there cannot be a verdict against both jointly, and a separate assessment of damages against each, for any trespasses committed by them separately at different times.² So although, in an action of trespass against several, who plead jointly, if the jury find them guilty jointly, they should assess the damages jointly against all, and should assess against all who are found guilty the amount which they think the most guilty ought to pay ; and it is error for the Court to instruct the jury to sever the damages, and assess respectively what in their opinion each party found guilty ought to pay ; yet the error has been held not to be one of which a defendant may complain, it not being to the disadvantage of any defendant. And, if the jury by mistake assess several damages, the plaintiff may enter a *nol. pros.* as to some, and take judgment against one.³ So, where the Court refused to allow separate trials in an action against two defendants for a joint trespass, but instructed the jury that they might make a distinction in the assessment of damages, and the jury made no such distinction ; it was held that the refusal of the Court was proper.⁴ So, in an action of trespass against

¹ Proprietors, &c. v. Boulton, 4 Mass. 419 ; Kempton v. Cook, 4 Pick. 305.

³ Crawford v. Morris, 5 Gratt. 90.

⁴ Johnson v. Hannahan, 3 Strobb.

² Bosworth v. Sturtevant, 2 Cush. 392. 425.

three defendants, the jury assessed \$7.83 damages against each, stating the aggregate amount at \$23.49. The Court informed the jury, that the law required joint damages, and directed a verdict to be drawn up in proper form for the sum of \$23.49 against the three defendants. Held, the verdict was legal and proper.¹ (a) So, where the jury, in an action of trespass against two joint trespassers, returned the following verdict: "We, the jury, find A. \$150, and B. \$100, and all the costs to be paid by A. and B., and \$50 damage to be paid by A.;" it was held, that the legal effect of the verdict was, that the jury intended to find \$200 damages against A., the principal trespasser, and

¹ Fuller v. Chamberlain, 11 Met. 503.

(a) The case of *Buddington v. Shearer*, 20 Pick. 477, was an action of trespass, founded upon a statute, which provides that "every owner or keeper of any dog shall forfeit, to any person injured by such dog, double the amount of damage sustained by him." It was proved that the mischief was done by a dog belonging to one Mowry, together with another dog alleged to belong to the defendants. The jury were instructed, that the owner of each dog was liable for all the damage done by both, while they were together; but, on exceptions, this instruction was held erroneous. Wilde, J., says: "The law was laid down differently in the action of *Russell v. Tomlinson et al.* 2 Connect. R. 206, an action founded on a similar statute of the State of Connecticut; and we are of opinion that that case was rightly decided, for the reasons there stated. The action was brought against two owners of dogs who owned the dogs severally. And the Court held that a joint action could not be maintained against them, although the mischief were done by the dogs jointly; but that each owner was liable only for the mischief done by his own dog. There may be some difficulty in ascertaining the quantum of damage done by the dog of each, but the difficulty cannot be great. If it could be proved what damage was done by one dog, and what by the other, there would be no difficulty; and on failure of such proof, each owner might be liable for an equal share of the damage, if it should appear that the dogs were of equal power to do mischief, and there were no circumstances to render it probable that greater damage was done by one dog than by the other. But whatever the difficulty may be, it can be no reason why one man should be liable for the mischief done by the dog of another."

that a joint judgment should be entered against both defendants for that amount, and a *remittitur* entered as to the \$100 found against B.¹

26. Although, in trespass against several defendants, who jointly plead not guilty, one of them, against whom there is no evidence, may be acquitted, and a verdict taken against the others; it is otherwise as to a joint plea of justification, under which, if it be not supported as to all the defendants, none of them can be protected.²

27. In trespass against several defendants, where one was not served with process, and, on trial before a justice of the peace, judgment was rendered against those who had been summoned, and, upon an appeal taken by them, judgment was rendered not only against them, but also against the defendant not summoned; it was held, that as to him the judgment was a nullity.³ But in trespass against A., B., and C., A. and B. were taken, and C. returned *not found*. The plaintiff declared against A. and B., *simul cum*. C. pleaded *not guilty*, and the jury found a general verdict of guilty. A. and B. moved in arrest of judgment, on the ground that the plaintiff could not proceed, until all the defendants were brought into court. Held, the plaintiff might, at his election, proceed against one or more of the defendants; and the declaration, though informal, was good after verdict.⁴ But, where one of three defendants in trespass before a justice of the peace appealed, and the plaintiff filed a declaration against him alone, and the defendant demurred to the declaration on that ground, and because it set out an offence different from that described in the warrant; the demurrer was overruled.⁵ And where, in an action of assault and battery against two defendants, one only is taken, and the plaintiff declares as against joint debtors, stating one to be taken and the other not found; the declaration, though perhaps

¹ *Simpson v. Perry*, 9 Geo. 508.

² *Drake v. Barrymore*, 14 Johns. 166;
Gleason v. Edmunds, 2 Scam. 448. See
Settle v. Alison, 8 Geo. 201.

³ *Pritchard v. Campbell*, 5 Ind. 494.

⁴ *Rose v. Oliver*, 2 Johns. 365.

⁵ *Blassingame v. Glaves*, 6 B. Mon.
38.

the subject of special demurrer, will not be set aside as irregular.¹

28. So, where the plaintiff declared against A. and B. for a joint trespass, and A. suffered judgment to be rendered against him by default, and judgment was rendered against B. upon trial, and damages were assessed against A. at the same amount with the judgment against B., and the case was passed to the Supreme Court upon exceptions taken by B.; held, not erroneous.²

29. In trespass against three, judgment was rendered against all the defendants; on review, the plaintiff obtained a verdict against two only, and for increased damages; and the third was allowed to tax the costs of travel and attendance for himself and all the witnesses used in the defence, both on the first trial and on the review.³

30. In trespass for an assault and battery against two defendants, a verdict was rendered against both, and joint damages less than *four pounds* assessed. The plaintiff reviewed the action, and upon the second trial a verdict was found for one of the defendants and against the other, and damages assessed against the latter above £4. The first defendant recovered his costs, and the plaintiff recovered costs against the second; but whether costs of both trials or of the review only, was held doubtful.⁴

31. Where A. recovers a judgment against B. & C. for an assault and battery, B. being insolvent and C. much embarrassed; A. may have his judgment applied in satisfaction or set-off, against a judgment which B. had recovered against A. for an assault and battery, and A. may sustain a bill in chancery for that purpose.⁵ (a)

¹ *Jarvis v. Blennerhasset*, 18 Wend. 627.

² *May v. Bliss*, 22 Verm. 477.

³ *Durgin v. Leighton*, 10 Mass. 56.

⁴ *Galloway v. Pitman*, 3 Mass. 408.

⁵ *Simson v. Hart*, 14 Johns. 63.

(a) The most frequent case of joint rights and liabilities grows out of the relation of *partnership*. Partnership, however, is itself a *contract*, and the law relating to it falls almost exclusively under the head of contracts, either

as between the partners themselves, or in reference to their joint or several relations to third persons. A few miscellaneous points may be stated, pertaining to torts or wrongs.

Where persons enter into a copartnership, with a fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts, it is held that such persons cannot maintain an action of trespass *qu. claus.* jointly against a person who forcibly enters the storehouse and seizes the goods. *McPherson v. Pemberton*, 1 Jones, Law, 378.

An action lies against one, who fraudulently induced the plaintiff to enter into a general copartnership, with one who was the insolvent debtor of the defendant; and afterwards induced the copartners to assume all the debts due him from the insolvent, and then seized the plaintiff's property in satisfaction of the debts. *Bean v. Bean*, 12 Mass. 20.

If after the dissolution of a partnership, having outstanding debts, an insolvent partner sells a part of the partnership property, for the purpose of raising money to pay his individual debts, and the purchaser, at the time of the purchase, has full knowledge of the insolvency of such partner, and of his object in making the sale; the sale is fraudulent and void. *Geortner v. The Trustees, &c.* 2 Barb. 625.

In general, one partner may be held responsible for the wrongful act of another, if connected with the partnership business.

The managing partner of a mining copartnership refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, and there was subsequently a notice by the attorney for the defendants, offering to deliver up tools that were in the same building with the ore, but the notice was silent as to the ore. Held, evidence of conversion by all the partners. *Lloyd v. Bellis*, 37 L. & Eq. 545.

So, to support trover for notes against a partnership, it is only necessary to show that the conversion complained of was a partnership transaction. *St. John v. O'Connel*, 7 Port. 466.

And, in trover, the allegation that the defendants were partners is immaterial, and need not be proved. *Head v. Goodwin*, 37 Maine, 181.

Questions also arise, in reference to the liability of the undivided interest of a partner to be taken for his debts.

If an officer attach and take possession of personal property of a firm on a writ against one partner, who has no equitable interest in such property, he is a trespasser. *Cropper v. Coburn*, 2 Curt. 465.

A sheriff attached partnership property on a writ against the partnership, and afterwards, while the property was in his possession under that attachment, returned an attachment of the same property on a writ against one of the partners. Held, that, so long as the former attachment subsisted, he was not liable, in an action of trover, in favor of one who claimed under a sale from the partnership, but was unable to hold against the partnership

creditors; notwithstanding the partnership debt was afterwards satisfied, by the sale of other property attached at the same time. *Page v. Carpenter*, 10 N. H. 77.

The defendant, an officer of the Palace Court, seized under a *fi. fa.* against A., partnership effects of A. and B., and sold them to various purchasers, who carried them away. In trover by the assignees of B., (who had become bankrupt,) held, the seizure and sale did not amount to a conversion; but, in the absence of any evidence, to show in what proportions the partners were interested, the assignees were entitled to a moiety of the proceeds. *Mayhew v. Herrich*, 7 Com. B. 229.

One partner may either lose his claim and right of action against a third person, or become liable for the wrong of another partner, by subsequent *ratification* or *adoption*.

The stock and tools of trade of a partnership were attached at the suit of a creditor, and the officer delivered the same to the creditor, taking his accountable receipt therefor; and afterwards it was agreed between the creditor and one of the partners, that the creditor should take the property at an appraised value and appropriate it to the debts of the partnership; and they gave notice of this arrangement to the officer, and discharged him from his liability on account of the attachment. The other partner having brought trover against the officer, the proceedings were explained to him, and he said he was convinced that the partnership was insolvent, that the property had gone to pay its debts, and that the creditor had made an advantageous disposition of it; but he nevertheless continued to prosecute his action against the officer, saying that, as the affair had begun in the law, it might end in the law. Held, the question, whether the plaintiff had approved and ratified the doings with a full knowledge of all the facts, was for the jury; and if he had, the defendant was entitled to a verdict. *Hewes v. Parkman*, 20 Pick. 90.

Where one of two partners obtains goods by fraudulent representation as to the solvency and credit of the firm, and afterwards the firm sells the goods, replevin in the *cepi* lies against both. *Olmstead v. Hotailing*, 1 Hill, 317.

Where goods are obtained for the use of a firm by the fraud of one of its members, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act, and will be placed in the same situation, with reference to the rights of the vendors, as if he had directed his partner to procure the property, or had concurred with him in the transaction. So one is liable, either in *assumpsit* or *case*, for the consequences of frauds practised by another in the transaction of the partnership business; although he was entirely ignorant of such frauds, and derived no benefit therefrom. So, where one partner, on being notified of a fraud committed by another, and that the firm will be held liable there-

for, omits to repudiate or disaffirm what has been done by his copartner, he will be held to have adopted and ratified the fraud, and will, from thenceforth, be regarded as a joint wrongdoer. *Hawkins v. Appleby*, 2 Sandf. 421.

Where two partners wrongfully take property, and one afterwards settles with the owner for one half thereof, the owner may bring trover against the other for the remaining half. *McCrillis v. Hawes*, 38 Maine, 566.

CHAPTER XXV.

CORPORATIONS.

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| <p>1. General liability of corporations for tort.</p> <p>3. For what torts and in what actions corporations are liable.</p> <p>4. Fraud, liability for agents, &c.</p> <p>7. Expulsion of members.</p> <p>8. Banks—general liability.</p> <p>9. Negligence in collection of notes, &c.</p> <p>12. Deposits.</p> <p>19. Checks.</p> <p>23. Liability for officers and servants.</p> <p>31. Liability of officers, &c., of a corporation.</p> <p>33. Municipal corporations; liability for defective highways; does not exist at common law.</p> <p>35. For what roads a town, &c., is responsible—laying out, use, &c.</p> <p>36. "Safe and convenient;" meaning</p> | <p>of the terms; what constitutes a <i>defect</i> or <i>obstruction</i>; a question for the jury.</p> <p>39. Snow and frost.</p> <p>40. Want of lights, guards, railings, &c.</p> <p>41. Sidewalks.</p> <p>42. Notice—implied notice.</p> <p>43. The plaintiff must not have been himself in fault.</p> <p>48. Nature and proof of the injury.</p> <p>49. Liability of a town, as affected by that of other parties; injuries caused by railroads, &c.</p> <p>51. General nature of the action—pleadings.</p> <p>56. General liability of municipal corporations.</p> <p>63. Of individuals acting under statutory authority.</p> |
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1. In immediate connection with *joint* rights and liabilities, may be considered the subject of torts or wrongs committed by or against *corporations*.

2. It has been sometimes suggested, that a corporation is not liable, as such, for a tort.¹ But the better opinion is, that such liability has been always recognized by the English law;² and it may now be considered a well-settled doctrine. Thus an action lies against a turnpike company, for the value of a horse killed by the fall of a bridge on the road.³ Or against a canal company, for damage caused by the want of repair of its locks.⁴ So for not repairing a creek, which

¹ 1 Kyd, 225.

² Chestnut, &c. v. Rutter, 4 S. & R. 6; Yarborough v. Bank, &c. 16 E. 6.

³ Townsend v. Susquehanna, &c. 6 Johns. 90.

⁴ Riddle v. Proprietors, &c. 7 Mass. 169.

the corporation was bound to keep in repair.¹ Or against a turnpike company, for stopping a watercourse, and thus overflowing the plaintiff's tan-yard.² So against a corporation having the return of writs, for a false return.³ So where, by contract made through its president or agent, a *cotton-pressing* corporation agreed to unload a boat, and the corporation's slaves took possession of the cotton for that purpose, and carelessly sunk it; the corporation was held liable.⁴ So where the wall of a church, negligently permitted to stand after the rest of the building has been burned, falls upon a person passing along the street; the corporation are liable.⁵ And the rule may now be considered as perfectly established, that corporations are liable for injury caused by the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment.⁶ Or where, under like circumstances, an individual would be liable. Subject, however, to the following limitations.⁷ To render a corporation liable for the wrongful acts of its officers, it must either appear that they were expressly authorized to do the act, or that it was *bond fide* done, in pursuance of a general authority in relation to the subject of it, or adopted or ratified by the corporation.⁸ Where an affirmative act is complained of, the only way in which a corporation can be liable, in an action on the case, is, either by their organized action through the board of direction, or for the acts of their agents, on the principle of *respondeat superior*.⁹ And the obligation of a corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence.¹⁰

3. With regard to the nature of the wrongs for which a corporation, as such, may be held responsible; it has been

¹ Mayor, &c. v. Turner, Cowp. 86.

² 4 S. & R. 6.

³ Argent v. St. Paul's, 2 T. R. 16.

⁴ Marlatt v. Levee, &c. 10 Louis. 583.

⁵ The Rector, &c. v. Buckhart, 3 Hill, 193.

⁶ Ang. on Corp. 302.

⁷ First Baptist, &c. v. Schenectady,

&c. 5 Barb. 79; State v. Morris, &c. 3 Zab. 360.

⁸ Per Shaw, C. J., Thayer v. Boston, 19 Pick. 516.

⁹ Sherman v. The Rochester, &c. 15 Barb. 574.

¹⁰ King v. Boston, &c. 9 Cush. 112.

held, that an action for malicious prosecution, slander, false imprisonment, or assault and battery, cannot be maintained against a corporation aggregate, but must be brought against the individuals doing the deed.¹ But, on the other hand, it is held, that an action on the case, for a vexatious suit, may be sustained against a corporation aggregate.² And more particularly with regard to the *form* of remedy against a corporation for a tort or wrong; it was formerly supposed, that the action of *trespass* would not lie against a corporation, upon the technical ground that it cannot be subject to a *capias*, which is the proper process in that action.³ But it is shown by Mr. Angell—on Corp. 389—that municipal corporations have been held thus liable from very ancient times. Thus trespass was maintained against a *mayor and commonalty* for distraining beasts which were exempted from toll.⁴ So also for disturbing the plaintiff in taking deodands and other profits in a river.⁵ And it is now well settled, that *trover* or *trespass* will lie against a corporation aggregate for the acts of its officers or agents done in the performance of their ordinary duties, within the scope of their authority, or by special directions of the corporation.⁶ So a corporation may be sued for an assault and battery, committed by their servant, acting under their authority.⁷ It is said, "Where the directors of a company do acts in violation of their deed, in a matter in which they have no authority, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors, and are neglected, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of that neglect."⁸ But a corporation is not liable for a wilful trespass of a person employed by it, although

¹ Childs v. Bank, &c. 17 Mis. 213.

² Goodspeed v. The East Haddam, &c. 22 Conn. 530.

³ 1 Kyd, 223.

⁴ 2 Hen. VI. 1.

⁵ 45 Edw. III. 23.

⁶ Watson v. Bennett, 12 Barb. 196; The President, &c. v. Wright, 5 Ind.

252; Dater v. The Troy, &c. 2 Hill, 629; Maund v. Mon. Canal, &c. 4 Man. & G. 452; Eastern, &c. v. Broom, 2 Eng. L. & Eq. 406; Edwards v. Union Bank, 1 Branch, 136.

⁷ Moore v. Fitchburg, 4 Gray, 465.

⁸ Per Lord St. Leonards, Barge v. Shortridge, 31 Eng. L. & Eq. 44.

the act be authorized and sanctioned by its president and general agent.¹ And although an authority by a corporation to commit a tort need not be under seal; yet, in order to sustain an action of trespass for the act of its agent upon the ground of ratification, such ratification must be clearly proved. Thus, where the plaintiff had been taken into custody by a railway inspector, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector; and, at the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings; held, that such attendance was no evidence of ratification by the company, it not appearing that the facts were known to them.²

4. With reference, more particularly, to the liability of a corporation for *fraud*; if the directors of a joint-stock company, in the course of their dealings on behalf of the company with third parties, by fraud induce such parties to contract with them, and the company benefits by the transaction; the company will be bound by such fraud, even where the fraud consists in false reports submitted by the directors at their annual meetings to the company. Thus, in an action by the N. Joint-stock Company, bankers and brokers, for money lent to purchase shares in the company; the defendant pleaded, that the directors had in their annual reports falsely represented their affairs to be flourishing, whereas the company was insolvent; and paid large dividends, whereas such dividends were paid out of the capital; and that A., their manager, falsely representing the said shares to be of great value, induced him to purchase them, and at the same time, on the part of the company, offered to advance the money, and promised that the company would hold the shares for him until they could be sold at a profit, without his being called upon for the price; and he,

¹ *Vanderbilt v. Richmond, &c.* 2 Comst. 479.

² *Eastern, &c. v. Broom*, 2 Eng. L. & Eq. 406.

relying on such representations, accepted the shares, which A. accordingly bought and paid for and still possessed. Held, on demurrer, a good answer.¹ But where a corporation had different transfer books for different classes of its stock, and stockbrokers attached different values to the several classes, and a subscriber for stock, when he subscribed, was told by the officers of the corporation, that his stock would be transferable on a particular class of books, which was afterwards refused; it was held, that this was not a fraud which would avoid the contract, but that the remedy of the stockholder was by an action for damages.² So, in an action for calls against a shareholder of a joint-stock company, a plea, that the defendant was induced to become a shareholder by the fraud of the plaintiffs, was held bad, for not averring that the defendant had repudiated the contract, and had done nothing under it to make him liable as a shareholder.³ And a discharge from a stock subscription, on the ground of fraud, cannot be obtained by one who was himself a party to the fraud.⁴

5. The president of a corporation is not *ex officio* an agent to sell the property, and his representations as to property to be sold, unless he be specially authorized, are not binding on the company.⁵ And a fraudulent certificate of ownership of shares, over and above the limited capital stock of a corporation, by its agent intrusted with their transfer only, gives no recourse for damages against the corporation, to one taking it *bona fide* and without notice of fraud, from the original vendee with notice, in whose hands it was void. And the unauthorized issue of false and fraudulent certificates of stock, by the agent of a corporation, does not estop the corporation to deny its liability for damages thereby sustained

¹ National Exchange Co. v. Drew, 32 Eng. L. & Eq. 1.

² Lohman v. New York, &c. 2 Sandf. 39.

³ Deposit, &c. v. Ayscough, 37 Eng. L. & Eq. 56.

⁴ Southern Plank, &c. v. Hixon, 5 Ind. 166.

⁵ Crump v. U. S. Mining Co. 7 Gratt. 352.

by innocent purchasers.¹ Thus (in a recent and leading case) Schuyler, the president and transfer agent of the defendants, issued to A., without consideration, a certificate of ownership of eighty-five shares of the defendants' capital stock. The certificate was in all respects similar to the genuine certificates, which the agent was authorized by the by-laws to give, upon a transfer of stock made upon the books, and upon the surrender of the outstanding certificate. It was, however, fraudulent, and represented no genuine stock, and no existing certificate was surrendered previous to its issue, and this was known to A. The plaintiff received the certificate, with an assignment and power of attorney in blank, *bond fide*, as collateral security for a loan to A. upon his note, which loan was received and appropriated by Schuyler. The capital was limited by law to \$3,000,000, all of which had been duly issued previous to this transaction; and the par value of the shares was also fixed by law at \$100. After demand of payment of A., and his failure and insolvency, the plaintiff applied to the defendants to have the stock transferred, but they refused to allow it. The repayment of the market value of the shares, at the time the certificate was issued, was then demanded and refused, and this suit was brought. In the court below, it was held, that the plaintiff might recover the market value of eighty-five shares of the defendants' stock. But this decision was reversed by the Court of Appeals, who held, that the certificate was void in the hands of A., as it was issued fraudulently, and he paid nothing for it; and Schuyler had no power to issue a certificate, except on the conditions precedent, of a transfer on the books of shares by some previous owner, and the surrender of that owner's certificate; and this was known to A. Also, because it represented no stock, and neither the directors, by whom Schuyler was appointed, nor the corporation, had power to create the stock; all the

¹ *Mechanics' Bank v. New York, &c.* 3 Kern. 599. See *Mitchell v. Rome, &c.* 17 Geo. 574.

powers of the corporation in the creation and issue of stock being exhausted. Also, that the certificate was void under all possible circumstances; and the plaintiff could acquire no rights by the assignment of it, which were not possessed by his assignor; certificates of stock not being *negotiable instruments* in the sense of the commercial law, so that, by their indorsement and delivery to a person in good faith, a title to the stock they profess to represent may be acquired, although in the hands of the vendor they are spurious and void, and although the company has never recognized the transfer. Also, that an agent's apparent powers are those only which are conferred by the terms of his appointment, and for acts done within an authority thus manifested the principal is liable, but not for an act, which, though clothed with the indicia of authority by the agent, is not within his apparent authority. Schuyler had no apparent authority for his act, and his principal could give him none, and was not therefore liable. Also, that the doctrine, that the mere employment of an agent in situations of trust is a certificate of his character, and, in case he deceives others, to their injury, his employer must make compensation, is no further true, than that he must be responsible where the agent is guilty of fraud and deceit in doing his master's business, because the fraud enters into and is a part of the authorized transaction.¹

6. Persons who exercise the corporate powers of a corporation may, in their character as trustees be held liable in a court of chancery, for a fraudulent breach of trust; and a stockholder, where the directors collude with others who have made themselves liable by negligence or fraud, and refuse to prosecute, or where the directors are necessarily parties defendants, may file a bill in behalf of himself and the other stockholders; in which case, the corporation must be made a party defendant.²

¹ *Mechanics' Bank v. New York, &c.*
⁴ Duer, 480.

² *Colquitt v. Howard*, 11 Geo. 556.

7. A member of a corporation may claim damages of the company for expelling him without previous hearing.¹ But where the rules required that a member should be summoned before expulsion, and the affidavit stated that the complainant had been expelled without any summons; it was held, that this was no ground for an application to justices, after an award made by arbitrators, who had heard and decided upon the objection.² More especially, where, under the constitution and by-laws of a beneficial society, each member was entitled to receive in case of sickness three dollars per week, and bound to contribute such monthly dues as the society might declare, and entitled to twenty-four hours' notice before he could be expelled; an action lies for an expulsion made in the absence of a member, without notice or the waiver thereof, and neither the minutes of the proceedings of the society, nor oral testimony of the statements of the secretary to the society at the time of the expulsion, are admissible in favor of the society.³

8. The rights and liabilities of *banking corporations* are often brought in question. (a) A bank is liable for the fraud or mistake of its cashier or clerk, in the entries in its book, and in the false accounts of deposits.⁴ Or for the act of directors, in improperly refusing to permit a person to subscribe for or transfer stock.⁵ So it is held to be the duty of a bank, to prevent the entry of a transfer of stock, until satisfied that the party claiming to make such transfer is duly authorized to do so. Hence an action lies against the Bank of England, for permitting stock to be transferred without

¹ *Southern Plank, &c. v. Hixon*, 5 Ind. 66.

² *Long, ex parte*, 29 Eng. L. & Eq. 194.

³ *Washington, &c. v. Bacher*, 20 Penn. 425.

⁴ *Salem, &c. v. Gloucester, &c.* 17 Mass. 1; *Gloucester, &c. v. Salem, &c.* Ib. 53; *Foster v. The Essex, &c.* Ib. 479.

⁵ Ang. on Corp. 303.

(a) No action will lie by one bank against another, for collecting its bills and presenting them for payment in a harassing manner, with a malicious intent to injure its credit. *South, &c. v. Suffolk, &c.* 1 Williams, 505.

authority, and refusing to pay the holder the dividends due thereon; although he knew of the forgeries six months before such dividends became payable, (but not until after the transfers,) concealed it from the bank, and did not demand the dividends until after the escape of the forger; mere concealment, in the absence of assent to, or adoption of, the acts of the offending party, not divesting his vested right of action.¹ But a bank is not liable for the neglect of an officer, who does not act as the agent of the bank in the particular transaction complained of.²

9. A frequent claim against banks arises out of losses, alleged to result from some neglect or mistake on their part, in the collection of notes intrusted to them for that purpose. When a bill or note is forwarded to a bank, which receives and undertakes to collect it, the bank is liable, without special agreement, for any default of the agents or correspondents it employs for that purpose, in collecting or paying over the proceeds, or in fixing liability on the parties.³ Thus, where a bank received for collection a note payable in another State, under an agreement to collect it for seven per cent., and neglected to give information of non-payment, and to return the note to the depositor within a reasonable time; it was held, that they were liable to an action.⁴ So a bank receiving a note or bill for collection, upon a good consideration, at a distant place, is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, unless there is some agreement to the contrary; and has such special interest as will enable it to maintain an action for the injury sustained, without waiting for a recovery against itself.⁵ But, although a bank, by which notes and bills, payable at a distant place, are received for collection, without specific instructions, is bound to

¹ *Davis v. Bank*, &c. 9 Moore, 747.

² *Thatcher v. The Bank*, &c. 5 Sandf. 121.

³ *Commercial, &c. v. Union*, &c. 1 Kern. 203; *Bank, &c. v. Triplett*, 1 Pet. 25.

⁴ *Wingate v. Mechanics' Bank*, &c. 10 Barr, 104.

⁵ *Commercial, &c. v. Union*, &c. 19 Barb. 391.

transmit, or to cause the same to be transmitted, by suitable sub-agents, to some suitable bank, or other agent, at the place of payment, for that purpose; yet, where suitable sub-agents are thus employed, in good faith, the collecting bank is not liable for their neglect or default. (a) Thus the D. & M. Bank, at M., the plaintiffs, having discounted a number of drafts, payable in W., transferred the same, by a general indorsement, and without any specific instructions, to the N. E. Bank, the defendants, in Boston, their general agents, for collection. The latter, having no correspondent in W., transferred the drafts, by a like general indorsement, to the C. Bank, in Boston, then and afterwards in good credit, for collection. The C. Bank transmitted the drafts to their correspondent, the Bank of the M., in W., for the same purpose. The C. Bank having subsequently failed, the defendants demanded the drafts of the Bank of the M. before they became due; the latter refused to deliver the drafts, but collected them, and applied the proceeds to the payment of a balance due them from the C. Bank; whereupon the defendants commenced an action against the Bank of the M. to recover the amount. Held, that the defendants, having acted in good faith, and the C. Bank being a suitable agent, had authority to employ the latter to make the collection, without proof of general usage; and that, as the drafts were transferred to the defendants by a general indorsement, that bank might transfer them in the same manner to the C. Bank, and were not bound to make a restricted indorsement.¹ And when several agents are employed by a bank with distinct and separate duties, the knowledge of the residence of an indorser, by one of those agents, who was not the proper agent to give notice, is not the knowledge of the bank, and therefore can-

¹ *Dorchester, &c. v. New England, &c.* 1 Cush. 177; *Mechanics, &c. v. Carp*, 4 Rawle, 384.

(a) But the latter bank is liable directly to the party injured, without reference to any account between itself and the former bank. *Lawrence v. Stonington, &c.* 6 Conn. 521.

not be set up to charge negligence in giving notice.¹ So, although it is the duty of banks receiving notes for collection, to place them in the hands of a notary, that they may be protested in due time, when necessary; yet, when received, in the ordinary course of business, for collection, the bank is not responsible for any failure of the notary to do his duty.² And where a bank places a note for protest in the hands of the notary to whom its own business is uniformly intrusted, it will not be responsible for the failure of the notary to protest the note, or to notify the proper parties.³ So it is not sufficient, in answer to the *prima facie* defence of delivering the note to a notary, for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits. He must prove that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate, as to disqualify him for the discharge of an official act.⁴ So, to an action against a bank, for not duly demanding of the maker payment of a note left by the plaintiff with them for collection, it is a good defence, that the note was duly placed by the defendants in the hands of a competent notary public, for demand and protest, and that the negligence, if any, was on his part; the defendants having been the collecting agents for the plaintiffs for more than ten years, and having invariably placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiffs, and it being shown that there was an invariable usage among the banks in Boston, including the defendants, when notes are sent to them for collection to keep the same for payment until the close of banking hours, and, if not then paid, to put them in the hands of a notary.⁵ So the plaintiff, the holder of a post-note, issued by a bank that failed before the note fell due, sent it for collection to the defendant, another bank, which caused

¹ Goodloe v. Godley, 13 S. & M. 233.

² Citizens, &c. v. Howell, 8 Md. 530; Agricultural, &c. v. Commercial, &c. 2 S. & M. 592.

³ Baldwin v. Bank, &c. 1 La. Ann. 13; Bellemire v. Bank, &c. 1 Miles, 173.

⁴ Agricultural, &c. v. Commercial, &c. 7 S. & M. 592.

⁵ Warren, &c. v. Suffolk, &c. 10 Cush. 582.

payment to be demanded, and notice of non-payment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged, on the ground that by law the promisors were entitled to grace, although they had, while solvent, paid such notes without grace. At the time when the note fell due, the question, whether banks were entitled to grace on their post notes, had never been decided, and there was no uniform practice as to demanding payment of such notes, and giving notice to the indorsers, after the promisors failed. Held, this action, for negligence, could not be maintained.¹

10. In an action against a bank for negligence in failing to make a collection, evidence of the contents of a placard posted up in the bank, offering to make collections on certain terms, is admissible on the part of the plaintiff, after notice to produce it, and a failure to do so, or to account for it, without proof that the plaintiff read and acted on the faith of it.²

11. In an action against a bank for undertaking to collect a note payable in another State, under an agreement to collect it for seven per cent., and for neglecting to give information of non-payment, and to return the note; it appearing that, at the time of trial, the note was barred by the statute of limitations, and that the bank had never until then returned it to the depositor, and there being no evidence of the insolvency of the maker; held, the measure of damages was the amount of the note, with interest, less the seven per cent.³ (a)

12. The liability of a bank may also arise from *deposits* made in the bank.

13. Although a bank has no express regulation or by-law,

¹ *Mechanics, &c. v. Merchants, &c.*
6 Met. 13.

² *Wingate v. Mechanics, &c.* 10 Barr,
104.

³ *Ibid.*

(a) But the insolvency of a debtor may be shown in mitigation of damages. *Stone v. Bank, &c.* 2 Dev. 408.

relative to deposits of money and other valuable articles, and no account of them is required to be kept and laid before the directors and company; yet, if accustomed to receive them, with the knowledge of the directors, through its officers, and in its buildings and vaults, it is liable for such deposit.¹

14. Where a deposit of money is *general*, the money may be used by the bank for its own purposes, and the bank merely becomes the *debtor* of the depositor to that amount.² And this is presumed to be the nature of the deposit, unless the money is in a sealed packet, bag, box, or chest; which receptacles neither the bank nor its officers has any right to open.³

15. In general, a bank is liable only to the actual depositor; and, when payment is made to him, cannot be charged with the money a second time by a third person, although legally entitled to the money, or defrauded by the depositor.⁴

16. In an action against a bank, to recover the amount of a special deposit in gold, which had been fraudulently or feloniously taken from the vaults by its cashier and chief clerk; it appeared that the directors had no notice of the nature or amount of the deposit, or of the cashier's and clerk's doings, and that the latter had no *official* right to meddle with the deposit, except to close the doors of the vault upon it after banking hours. The bank was held not liable for the loss. The decision was predicated upon the general principle of the law of bailments, that, where a deposit is made from which the depositary derives no profit, he is liable only for *gross* negligence in relation to such deposit.⁵

17. The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account,

¹ *Foster v. The Essex*, &c. 17 Mass. 497.

² *Bank, &c. v. Wister*, 2 Pet. 324.

³ *Dawson v. The Real*, &c. 5 Ark. 283; *Foster v. Essex*, &c. 17 Mass. 504.

⁴ *Dacy v. Chemical, &c.* 2 Hall, 550; *Fulton, &c. v. N. Y. &c.* 4 Paige, 127.

⁵ *Foster v. The Essex*, &c. 17 Mass. 496.

that higher interest might be obtained for her money, if she purchased two houses, for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note, for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss. Held, in an action against them, that they were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and also, that as local manager he had authority from the bank to make an assignment of an equitable mortgage.¹

18. A bank is not bound to apply money deposited to the payment of a bill of the depositor, unless it had assented to receive such money. It is only in relation to its own dealers or customers that such assent can be implied. And a bank is not bound to receive, on deposit, the funds of every man who offers them. It has a right to select its dealers, and the cashier is the proper officer to make the selection. And, when the bank is bound to receive a deposit, it must, to render the bank liable for its application, be made with the proper officer. The receiving teller, when there is one, is the only proper officer to receive deposits. And a paying teller, receiving the funds of a stranger, and promising to apply them to the payment of a bill or a note, acts as the agent of the stranger, and not of the bank, which is not liable for any breach or neglect of his promise.²

19. Another frequent ground of claim against banks relates to the drawing of *checks*. And the general rule is, that, in an action against bankers for refusing to pay a trader's check, they having at the time sufficient assets of

¹ Thompson v. Bell, 26 Eng. L. & Eq. 536.

² Thatcher v. The Bank, &c. 5 Sandf. 121.

the trader; the latter may recover substantial damages, without proof of actual damage.¹

20. A., in Scotland, being indebted in £460 to B., in England, paid £460 into a Scotch bank, in return for a letter of credit on an English bank, in this form: "Please honor the drafts of B., to the extent of £460, which charge to the bank." A. inclosed this letter of credit in a letter to B., which arrived at B.'s office in B.'s absence. The only clerk in the office, but who had no authority to manage B.'s money transactions, opened the letter, took the letter of credit to the English bank, forged a check in B.'s name for the amount, received payment, and absconded. On B.'s return, he drew on the English bank for the £460; but his draft was dishonored, and the bank refused payment to him. B. then, along with A., sued the Scotch bank in Scotland for repayment of the £460. Held, the bank was liable, unless it could show, that the English bank either actually paid B.'s draft when called on to do so, or did something which, as between the English bank and B., the English bank was entitled to treat as equivalent to payment.²

21. The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account, known to be such by the defendants, to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff against the bankers, to refund this balance; held, in equity, a person who deals with another, knowing him to have in his hands or under his control moneys belonging to a third person, must not enter into a transaction with him, the effect of which is a fraud on such third person. Decree for repayment of the amount.³

¹ Rolin v. Steward, 25 Eng. L. & Eq. 341.

² Bodenham v. Hoskins, 13 Eng. L. & Eq. 222.

³ Orr v. Union, &c. 29 Ib. 1.

22. The crossing of a check, payable to bearer, with the name of a banker, does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the check, that the banker, upon whom the check is drawn, ought not to pay it except through a banker; for, if he does so, and the person presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit against his customer for the amount.¹ And the banker's duty is the same, where the crossing is by the customer or by an intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it. But, in an action against bankers for money lent, to which the defendants pleaded payment, it appeared that the plaintiffs had drawn a check on the defendants, crossed thus, "Bank of England, for account of the Accountant-General." The payee, to whom this check was delivered, struck out the crossing, by running a pen through it, leaving it, however, perfectly legible, and crossed it a second time with the name of his own bankers, and paid it into their bank to the credit of his own account. The check, being presented by them for payment, was paid by the defendants, who charged it to the debit of the plaintiff's account. The payee appropriated the sum so received to his own purposes, and it never was paid to the Accountant-General; and the plaintiffs, who were trustees, were obliged to pay the amount themselves. Held, that the check, being thus doubly crossed, afforded no additional evidence of negligence against the defendants.

23. In regard to the general liability of a bank for the doings of its officers or agents; a bank is not responsible for the frauds of its servants, unless it has neglected to make the customary examinations of books and papers.²

¹ *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 513.

² *Manhattan, &c. v. Lydig*, 4 Johns. 377.

24. It should not be assumed by the Court, as matter of law, that a direction by the cashier of a bank to a sheriff, to sell property levied on, was the act of the bank. Such direction is *evidence* of an interference with the property, which should be submitted to the jury, on the trial of an action of trespass against the cashier.¹

25. For the negligence of a bank, acting as agent of another bank, in regard to business intrusted to it by a third party, both banks are jointly liable to the principal.²

26. By the deed of copartnery of a joint-stock bank, the directors were to submit yearly abstracts of the company's affairs, showing a balance, which abstracts should be binding on the partners, who were to have no right to examine the company's books; but it was to be competent to a majority of partners, at a general meeting, to appoint two of themselves, to examine and report on the company's affairs in general. It was also provided, that, if at any time it should be found, on balancing the books, that the losses amounted to a certain sum, the company was to be *ipso facto* dissolved. A., a partner, filed his bill, alleging that the yearly abstracts were false and fraudulent; that the losses already equalled the specified amount; that the directors had misapplied the funds, and, by undue influence, procured a majority of partners to back them; and that the company was insolvent. Held, that the plaintiff's allegations were sufficient to warrant a reference to an accountant to inspect the company's books, and report whether the abstracts were false, and whether the losses equalled the specified amount. Also, that A. was not estopped by the deed from seeking redress in equity; for the deed contemplated a case, where the abstracts were *bonâ fide*, and not fraudulent. Also, that, the expression, "if on balancing the books a certain loss be found," being general, the Court was justified in taking its own way of ascertaining the fact of

¹ *Watson v. Bennett*, 12 Barb. 196.

² *The Montgomery, &c. v. The Albany, &c.* 8 Barb. 396.

the loss, though the deed may contain provisions as to a particular mode of ascertaining it. Also, that "the losses of the company" include such losses as may arise through the fraud of the directors, and for which the directors may be personally liable.¹

27. Where a bank had, through the fraud of its agent, obtained certain assets as security for its liabilities through another bank; held, that, though it was not liable criminally, yet it was liable *civiliter*, as it had appointed the end, though not the means, and that it could not retain any advantages which had been gained through the agent.²

28. In trover for certain checks, &c., drawn upon banks in New York, it appeared that the plaintiff was in the habit of sending checks to his agent in that city, to be converted into cash, for the purpose of buying Eastern money. The plaintiff indorsed the checks in question to his agent, and sent them to him for that purpose. The agent indorsed them to the defendants, who received them without notice of the agency, and paid value by passing the amount to the credit of the agent, and certifying checks on their bank for the amount of the credit. The agent misapplied the funds and failed. Held, that the title to the checks passed to the defendants, and therefore that the action would not lie.³

29. It seems that notice received by the cashier, in the course of the duties of his office, concerning matters pertaining to the business of the bank, is notice to the bank.

30. The defendants, a banking company in New York, had funds belonging to the plaintiffs, who were incorporated, and in the exercise of banking powers, in New Jersey. The cashier of the defendants, also one of the managers of the plaintiffs' bank, loaned a portion of these funds, to be repaid upon demand, and notified the plaintiffs' cashier of the loan, by letter, which was duly received. The letter was imme-

¹ North, &c. v. Collins, 29 Eng. L. & Eq. 7.

³ Case v. The Mechanics, &c. 4 Comst. 166.

² Johnston v. S. W. R. R. Bank, 3 Strobb. Eq. 263.

diately answered by the plaintiffs' cashier, and the investments were acknowledged by him to be satisfactory. Subsequently, the managers of the New Jersey Company met, and took action in relation to their New York affairs, but no objection was made or disapprobation expressed as to the loan. Held, that the plaintiffs were chargeable with notice that the loan had been made, as soon as that notice was received by their cashier, or at least from the time of the meeting of their board of managers; and as by their silence they had ratified it, the defendants were not liable for permitting the funds to be withdrawn from their bank and loaned, even if it was done without authority.¹

31. The *officers* or *agents* of a corporation may be liable, for wrongs committed by them as such. (a) So, even though the company is itself responsible. Thus an act, providing that a town shall be liable for all illegal doings and defaults of one of its officers, does not necessarily exempt the officer himself from liability.² And it is no answer to an action of trover for bank-notes, that the defendant, as cashier of the bank, received them on special deposit.³ But, in general, an action does not lie against individuals for acts done by them in a corporate capacity; at least, not without proof of malice.⁴ And if an individual

¹ *New Hope, &c. v. Phoenix, &c.* 3 Comst. 156.

² *Rounds v. Mansfield*, 38 Maine, 586.

³ *Coffin v. Anderson*, 4 Blackf. 395.

⁴ *Harman v. Tappenden*, 1 E. 555.

(a) An action lies against the members of a corporation, by their private names, for a false return to a *mandamus* by their corporate name. *King v. Rippon*, 1 Com. 86.

In New York, where trustees of an unincorporated company, with others of the company, wrongfully and fraudulently convert property of the company, the other members can maintain an action against them all together for the value of the property; although it is averred that the defendants did not faithfully discharge their trust. *Dennis v. Kennedy*, 19 Barb. 518.

stockholder has suffered damage, in a contract with the corporation, through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation. He can maintain no action against the directors, who are themselves liable to the corporation.¹

32. While a claim may be made against officers of a corporation by third persons, the officer or agent of a corporation is also liable *to the corporation* for all damages occasioned by the violation of his duties and obligations; and, in general, only to the corporation, not to the stockholders;² the remedy of the latter being against the corporation itself.³ (a) Thus the officers of a bank are agents of the corporation, and are liable for an abuse of their trust, wherever the agents of an individual would be.⁴ Where an owner of a bill indorses it, and sends it to a bank for collection; the bank, having a special interest in it and in the proceeds thereof, can sustain an action against such agent as it may employ to collect it, for omitting to pay over the proceeds, or for default in charging the parties.⁵

¹ Smith v. Poor, 40 Maine, 415.

Brown v. Van Dyke, 4 Halst. Ch.

² Bayless v. Orne, 1 Freem. 175; 795.

The Franklin, &c. v. Jenkins, 3 Wend.

⁴ Austin v. Daniels, 4 Denio, 299.

130.

⁵ Commercial, &c. v. Union, &c. 1

³ French v. Fuller, 23 Pick. 108; Kern. 203.

(a) But in equity, although the corporation may proceed against the officers or agents for misapplication of the funds; (Robinson v. Smith, 3 Paige, 233,) yet, if the directors collusively refuse thus to proceed, or if the parties in fault still control the company, and in cases of breach of trust, the parties in interest may proceed in their own names making the corporation a defendant. Ibid.; 1 Freem. 173; 4 Halst. Ch. 795. See Scott v. Depeyster, 1 Edw. 513.

A stockholder in a bank cannot maintain an action against its directors, for their negligence in so conducting its affairs, that its whole capital is wasted and lost, and the shares therein rendered worthless; nor for the malfeasance of its directors in delegating the whole control of its affairs to the president and cashier, who waste and lose the whole capital. Smith v. Hurd, 12 Met. 371.

So the payment of overdrafts, by a cashier appointed to keep money and pay it to the checks of persons entitled to draw, is, without some special excuse, a violation of duty.¹ So, where the treasurer of a corporation obtains permission to borrow the funds in his hands, upon giving his note with a mortgage, and he gives his note for them without the mortgage, he is not exonerated from liability as treasurer for the amount.² So, although the general agent of a company is not responsible for bad debts, or for the negligence or faithlessness of agents necessarily employed by him, yet it is his duty to see that the debts to the company are collected, and he must show that he exercised ordinary diligence for that purpose.³ And, in general, the officers and agents of a corporation are liable for losses and defalcations caused by *neglect*, or the want of reasonable care and diligence.⁴ So, where the officers of a bank purchase State stocks, to carry on a private undertaking, and sign a contract, obliging the bank to pay for the same, and then take money from the bank, to fulfil such engagement; they are liable for the money so taken to the receiver of the bank. And the assent of the president, who was the financial officer of the bank, does not protect the cashier from his liability to the bank.⁵ But officers of a corporation are not liable for mere *mistake*.⁶ So directors of a bank are not responsible for an injury to the bank, caused by their act, originating in an *error of judgment*, unless the act be so grossly wrong as to warrant the imputation of fraud, or the want of the necessary knowledge for the performance of the duty assumed by them, on accepting the agency. And giving compensation to a member of the board of directors, for extra services as an agent of the bank, though unlawful, is not such an act as will expose

¹ Bank, &c. v. Calder, 3 Strobb. 403.

² Bluehill, &c. v. Ellis, 32 Maine, 260.

³ Williams v. Gregg, 2 Strobb. Eq. 297.

⁴ Percy v. Millander, 3 Louis. 568;

Scott v. Depeyster. 1 Edw. 513; Ponchartrain, &c. v. Paulding, 11 Louis. 41.

⁵ Austin v. Daniels, 4 Denio, 299.

⁶ 1 Edw. 513; 3 Louis. 568; 11, 41.

the directory to liability, if done in good faith, and with the honest intent of benefiting the bank.¹

33. The corporations, to which we have referred in the present chapter, are those instituted for purposes of *trade or business*, and usually acting under express charters or acts of incorporation. It remains to speak of another class, sometimes called *quasi-corporations*. This term is applied to such bodies or municipal societies, which, though not vested with the general powers of corporations, are yet recognized by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suits at law.² Our plan, however, requires us to notice only one of this class of corporations, to wit, towns or cities; and these almost wholly with reference to one form of liability—that arising from injuries caused by *defective roads or highways*.

34. The civil liability of municipal corporations, for injuries sustained in consequence of defects in highways, is dependent upon express statutes, which have been enacted in some of the States; and does not exist at common law.³ (a) And the only remedy is the remedy afforded by statute; the application of which depends upon the terms and conditions provided in such statute.⁴ On the other hand, so long as the public highways are kept by towns in a condition safe and convenient for travel, they fulfil all the duty required of

¹ Godbold v. Bank, &c. 11 Ala. 191. Batty v. Duxbury, 24 Verm. 155; Hall

² Bouv. Law Dict.

v. Richmond, 2 W. & M. 337.

³ Mower v. Leicester, 9 Mass. 247.

⁴ Brady v. Lowell, 3 Cush. 121.

See Ball v. Winchester, 32 N. H. 435;

(a) Thus, in New York, there is no obligation, either by statute or at common law, upon towns, to keep in repair highways within their limits; nor will an action lie against a town to recover damages for an injury occasioned by a defect in the highway. Morey v. Newfane, 8 Barb. 645.

On the other hand, where such liability is imposed by statute, it is held that there is no necessary privity between the traveller and any one but the towns, as to the sufficiency of the highways. The towns must look to those who obstruct their highways for redress. Willard v. Newbury, 22 Verm. 458.

them by the laws of the State. Thus, if, from neglect to repair a culvert, the water of a stream is cast back on the land of individuals above the road, the town is liable, if at all, only at common law. If the culvert is obstructed by a mere wrongdoer, the town is not liable either by statute or common law.¹ So, notwithstanding the statutory liability for injuries caused by defective highways, an action cannot be maintained against a town, for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, by reason whereof he was prevented from travelling on the road, with his cattle and teams, and on foot, and from transporting his logs and timber to a saw-mill, and from otherwise working in his wood-lot, and about his logs and wood.² Nor for the obstruction of a highway by snow, negligently suffered to remain thereon, by reason whereof the plaintiff was prevented from passing over the same with his horses and sleigh, and was put to great trouble, expense, and loss of time in extricating them from the snow.³ So an owner of land, prevented from a convenient access thereto by a defect in the highway, cannot maintain an action against the town, liable to keep such highway in repair.⁴ But it is no excuse for a city, when an injury is sustained by the streets being out of repair, to allege that there was no money in the treasury by which the repairs could be made.⁵ So a city is responsible for any injury resulting from neglect to keep the streets in repair, whether the neglect is wilful or otherwise.⁶ (a)

¹ *Peck v. Ellsworth*, 36 Maine, 393.

⁵ *Erie City v. Schwingle*, 22 Penn.

² *Holman v. Townsend*, 13 Met. 297. 384. See *Hutson v. New York*, 5

³ *Brailey v. Southborough*, 6 Cush. Sandf. 289.

141.

⁶ *Erie City v. Schwingle*, 22 Penn.

⁴ *Smith v. Dedham*, 8 Cush. 522.

384.

(a) Companies receiving toll from passengers, upon roads laid out and kept up by them, are responsible for damages resulting from want of repair. And when a highway is superseded by a plank road laid upon it, the town is not responsible for its defects. *Davis v. Lamoille, &c.* 1 Williams, 602.

Towns are responsible for damages resulting from a want of reasonable repair in a *pent road*, taking into consideration its character and importance. *Loveland v. Berlin*, 1 Williams, 713.

35. With regard to the establishment or *laying out* of a highway, necessary to make a town or city liable for any defect therein ; although a road is used as a town way, yet, in an action against the town, on account of an injury sustained from a defect in the way, the town may show that the road was not duly laid out and accepted as a town way.¹ (a) So, where the owners of land in a city open and dedicate it to public use, as a footway, placing a fence across it, which

¹ Jones v. Andover, 9 Pick. 146.

(a) By stat. 1803, c. 111, annexing to Boston that part of Dorchester now known as South Boston, the selectmen of Boston were authorized to lay out such streets, in South Boston, as in their judgment would be for the common benefit of the proprietors of the land, and of the town of Boston ; provided, that no compensation should be allowed the proprietors for such streets as should be laid out within twelve months from the passing of the act ; and provided, also, that the town of Boston should not be obliged to complete the streets so laid out, sooner than they might deem it expedient. In pursuance of this authority, the selectmen, within the twelve months, laid out various streets over the entire territory of South Boston, and among others a very long street, denominated Second Street, which subsequently became distinguished in two parts, namely, Second Street East, and Second Street West, or Dorchester Street. The mayor and aldermen, in 1831, adopted an order that Second Street west of Dorchester Street should be made passable, and subsequently passed orders, in 1834 and 1836, appointing committees to "cause Second Street, at South Boston, to be repaired and put in good order," and "to be properly graded and gravelled;" in pursuance of which, that part of Second Street, known as Second Street West, had been completed and used as a highway ; but no part of Second Street East, though occasionally used as a highway, had ever been ordered to be completed and made passable, unless included in the above orders. In an action against the city of Boston, to recover damages for an injury occasioned by a defect in Second Street East, it was held, that, in order to render the defendants liable, it was not sufficient to prove, that the way complained of had been so travelled and used as to become a highway *de facto*, but that it must appear, not only that such way has been laid out, but that the mayor and aldermen, by an official act, had determined upon its completion, that is, when the same should be graded, fitted for travel, and opened for use ; and that the orders above mentioned related only to Second Street West. *Bowman v. Boston*, 5 Cush. 1.

allows foot passengers to pass, but is dangerous to horses and carriages; the city, whether they have accepted the way or not, are not liable for an injury occasioned by the fence to a horse and carriage, though driven with ordinary care and skill.¹ So, if an incorporated company within the limits of a town lay out a road and dedicate it to the public use, the town will not thereby become liable to repair it, unless it has in some way accepted or adopted it as a way.² But, in an action against a town for an injury sustained in consequence of a defect in a highway, a declaration that the way was "a town way or road leading, &c., which road" it was the duty of the town to maintain; is supported by evidence, that it was an ancient road or way, used by the public and the town, and kept in repair by the town.³ So the use of a road for more than twenty years is evidence of its being a public highway, especially if it has been yearly repaired during that time, and included within the limits of surveyors' warrants. And its width, in such case, where it is not fenced out on both sides as a road, will extend the usual distance each side from the travelled path.⁴ And it seems, that, if a town, in making a county road, deviate from the true location, they are estopped, in an action against them for an injury occasioned by its being out of repair, to deny their liability to maintain it as they have made it.⁵ So the erection and support of a bridge by a town, and the use of it by the public for thirty-eight years, are sufficient proof of its existence as a highway, on the presumption of a laying out, a grant or a dedication, to render the town liable for an injury occasioned by its being out of repair.⁶ So a way is sufficiently shown to be a highway, by proof that it has been known and used as a highway for forty years, and during that time has been repaired by the town.⁷ So a city is liable

¹ *Hemphill v. Boston*, 8 Cush. 195.

² *Bryant v. Biddeford*, 39 Maine. 193.

³ *Stedman v. Southbridge*, 17 Pick. 312.
162. See *State v. Sartor*, 2 Strobb. 60;
Calder v. Chapman, 8 Barr, 522.

⁴ *Hull v. Richmond*, 2 W. & M. 337.

⁵ *Williams v. Cummington*, 18 Pick.

⁶ *Ibid.*

⁷ *Reed v. Northfield*, 13 Pick. 94.

for defects in one of its highways, after it is built and opened to the public, though the time allowed for its construction after acceptance had not elapsed, if the city had reasonable notice of the defects.¹ So a town becomes responsible for an injury occasioned by a defect in a highway, from the time when the way is opened for public travel. And evidence that a road has been paid for by order of the commissioners, (the tribunal for laying it out,) and in fact travelled since it was left by them as finished, is admissible against the town, to prove that the road had been opened for public use, and accepted and adopted by the town.²

36. Where any liability upon this subject is imposed by statute, it is, in general, only required of towns to keep their roads in such state of repair, as to be *safe and convenient*, without defining what imperfections would constitute a ground of action. Whether a road is in such condition or not, is a question for the jury.³ (a) But a jury cannot infer, from the mere existence of a road, that it was *wide enough* to be safe and convenient.⁴ Nor on the other hand are the

¹ Blaisdell v. Portland, 39 Maine, 113.

² Bliss v. Deerfield, 13 Pick. 102.

³ Merrill v. Hampden, 26 Maine, 234; 37 Ib. 250; 17 How. 161.

⁴ Hunt v. Rich, 38 Maine, 195.

(a) "Defect or want of repair" is the language of the statute in Massachusetts. Rev. Stats. 246.

Similar terms are used in other States. In Maine, "safe and convenient" is the statutory requisite.

The liability of towns is sometimes held to require them, after having reasonable notice of the existence of obstructions in their highways, to remove them, *or make safe by-ways to pass around them*, or to see that they are properly made by others. Batty v. Duxbury, 24 Verm. 155. See Rice v. Montpelier, 19 Ib. 470.

In an action against a town to recover damages for an injury occasioned by a defect in a highway, it is no justification that such defect existed in the road as it was left by the commissioners. Bliss v. Deerfield, 13 Pick. 102.

It has been held, that for any *indictable* obstruction an action may also be maintained by a party injured. Hutson v. New York, 5 Sandf. 289. See Thornton v. Springer, 5 Tex. 587.

jury to infer a defect in a highway at a particular time and place, merely from the fact that an injury was sustained at that time and place; but they may take that fact into consideration, in connection with the other facts in the case. The terms "safe and convenient," as applied in the statute, do not mean *entirely* safe, and *entirely* convenient, but are to be considered by the jury, according to their knowledge and experience, in the ordinary transactions of men, in their usually accepted meaning. It is proper for the jury to take into consideration the nature of the business in the town, in connection with other facts in the case, and with the obligation of the town to keep the highway in repair, for the use of the inhabitants of other towns, as well as of its own inhabitants.¹ So the nature of the country, whether rough and hilly, or smooth; the amount of travel; the places near, on which carriages could be turned out; and the ordinary care exercised usually by towns on this subject; must fix whether the town was guilty, in the case at bar, of culpable neglect or not.²

37. The jury were rightly instructed, in an action against a town for defects in the highway, that there may be localities, where it is the duty of the town to make the street safe for travel, over the whole width laid out.³ (a) So,

¹ Church v. Cherryfield, 33 Maine, 460.

² Hull v. Richmond, 2 W. & M. 337.

³ Bryant v. Biddeford, 39 Maine, 193.

(a) In an action against a city, the Judge instructed the jury, among other things, that what was a defect in a highway, which would render a town or city liable, was a "practical question to be determined by the jury in view of the circumstances of each particular case," and added, by way of illustration, "that a different state of repair would be required in a city, where a large amount and variety of travel was constantly passing, than in a country place, where the state of things in this respect was different." Held, that, understanding the term "city" to be used to designate a closely-built and thickly-settled place, with a great amount and variety of travel, as distinguished from a place of an opposite character, through which there was little travel; the illustration was a proper comment on the law, and not likely to mislead the jury. Fits v. Boston, 4 Cush. 365.

whether obstructions in a highway render it unsafe, though the obstructions are not in the travelled part, is a question for the jury; and the width of the way may be an essential element in determining this question.¹

38. But, in general, towns are not obliged to keep *the whole* of a highway, from one boundary to the other, free from obstructions, and fit for the use of travellers. Thus, where the travelled part of a highway was raised with a gutter on each side, and, beyond the gutter on one side, and nearly eight feet from the travelled path, were large loose stones which occasioned an injury to a traveller's horse; it was held that the town was not answerable.² So a town is not obliged to make the sides of all its roads passable with wheels, with safety and convenience; but it must have so much of them passable, as not to delay travellers, or endanger them, in getting by at places not very remote or very inconvenient.³ So, in a highway running east and west, the wrought path was changed from the south to the north side of the space between the limits of the highway, leaving a steep descent between the new and the old wrought path; and the old path ceased to be a part of the wrought or travelled pathway. At a right angle with the highway, and running therefrom southerly, was a road leading to the house of A., which road on a certain day was wholly obstructed by snow; and there was, on the same day, a private pathway made by A., across his fields, from his house to that part of the highway, where the wrought and travelled path had been thus changed. While the road was thus obstructed, A., knowing all the facts, was travelling in a sleigh along the newly wrought and travelled path, and turned his horse southerly, for the purpose of entering upon the private pathway, and, in passing down the descent between the

¹ Hull v. Richmond, 2 W. & M. 189. See Jaquith v. Richardson, 8 Met. 213.

² Howard v. N. Bridgewater, 16 Pick.

³ Hull v. Richmond, 2 W. & M. 337.

new and the old wrought and travelled path, his sleigh was upset, and he received an injury. Held, he could not maintain an action against the town.¹ But where there is conflicting evidence, as to the condition of the road, and the prudence exercised by the plaintiff, it is error for the Court to charge the jury, as matter of law, that the defendants are entitled to a verdict, if the travelled path was well beaten to such a width, that the plaintiff might conveniently have passed at any specified distance from its margin, at which the injury was received.²

39. In general, a town is liable for defects and obstructions caused by *snow*.³ And the Court will not lay it down as a rule of law, that *treading down snow*, so that the street shall not be blocked up or incumbered, is sufficient to exempt the town from liability.⁴ So, if the usually travelled part of a highway is obstructed with snow, and the only way broken out is at the side over a frozen ditch, the town is liable for defects in such way. And the occurrence of a rain and a thaw is sufficient notice to the town of its unsafe condition.⁵ So the defect may consist in holes, caused by the sinking of stones below the surface, through the action of *frost*.⁶

40. A town is also liable for the want of proper *guards or lights*, placed at points where the ways are repairing.⁷ Or the want of a rail or barrier, if necessary for the proper security of travellers, and if it would have prevented the injury.⁸ And, although towns are not ordinarily bound to fence their roads, they are bound to erect fences or railings, at places which would otherwise be unsafe or inconvenient for travellers exercising ordinary care.⁹ So a traveller, while in the exercise of ordinary care, received an injury in

¹ *Shepardson v. Colerain*, 13 Met. 55.

² *Seasons v. Newport*, 23 Verm. 9.

³ *Loker v. Brookline*, 13 Pick. 343.

⁴ *Providence v. Clapp*, 17 How. 161.

⁵ *Savage v. Bangor*, 40 Maine, 176.

⁶ *Tripp v. Lyman*, 37 Maine, 250.

⁷ *Kimball v. Bath*, 38 Ib. 219. See *Worcester v. Canal, &c.* 16 Pick. 541.

⁸ *Palmer v. Andover*, 2 Cush. 600.

⁹ *Collins v. Dorchester*, 6 Cush. 396.

consequence of driving his wagon against a *post*. It appeared, that the line of the highway was not indicated by any visible objects, and the post was near the true line, and within the limits of the general course and direction of the travel, and rendered the travelling dangerous; that there was nothing to indicate that the post was not within the way intended for public travel; and that the town, though they had reasonable notice of the course of the travel, and that the post was dangerous to travellers, suffered it to remain an unreasonable time. Held, the town was liable.¹

41. *Sidewalks*, when a part of the public streets, as in the city of Boston, are to be kept in all parts safe and convenient for public use. Thus a sidewalk six and a half feet in width. And this, notwithstanding an act respecting the streets of Boston, and a city ordinance passed in pursuance thereof, authorizing the surveyors of highways to regulate the width and height of sidewalks, and to accept and bind the city to maintain them, when built and relinquished to the city by the abutters.² So it is the duty of cities and towns to keep that part of the street, which lies between the carriage-way and the sidewalk, in such repair, that foot passengers may cross any part thereof with safety, using reasonable care and caution; and the establishing of raised crossings at proper distances is not a sufficient compliance with this duty. But the projection of the movable grating of a culvert, from one to two inches above the level of the edge of the sidewalk against which it rests, is not a defect, which makes the city responsible for an injury occasioned by stumbling over the grating.³ So a city is liable for an injury caused by the fall of an *awning*, projected over a sidewalk by the owner of a building, if dangerous to travellers.⁴

42. Previous *notice* of the defect or obstruction is usually

¹ *Cogswell v. Lexington*, 4 Cush. 307.

² *Raymond v. Lowell*, 6 Cush. 524.

⁴ *Drake v. Lowell*, 13 Met. 292.

³ *Bacon v. Boston*, 3 Cush. 174.

made an express condition of the town's liability. (a) But notice may be *inferred*, from the notoriety of the defect, and its continuance for such a length of time, as to lead to the presumption that the proper officers of the town knew, or with proper vigilance and care might have known of it.¹ Thus the occurrence of a rain and thaw is sufficient notice of a defect in a temporary way over a frozen ditch.² So notice to two of the inhabitants, capable of communicating the information, though not among the principal men of the town, and not assessed for public taxes; is sufficient notice to a town.³

43. Upon the principle in *pari delicto*, already explained—chap. 4—one injured by an obstruction in the highway cannot maintain an action, if he did not himself use ordinary care.⁴ Or such care as persons of common prudence generally exercise.⁵ In other words, it must be proved, that the highway was not safe and convenient; that the plaintiff exercised ordinary prudence and care; and that the injury was occasioned by the defect in the highway alone.⁶ Hence, when the injury is occasioned by a defect in the highway, and want of care on the plaintiff's part, jointly, the town is not accountable.⁷ Thus, if the injury was occasioned jointly by a defect in the highway, and a defect in the plaintiff's horse, carriage, or harness, rendering the same unsafe or unsuitable, the plaintiff cannot recover, although he had no knowledge of such deficiency, and was in no fault for the want of such knowledge.⁸ And the burden of proof is upon

¹ *Tinker v. Russell*, 14 Pick. 279.

² *Savage v. Bangor*, 40 Maine, 176.

³ *Mason v. Ellsworth*, 32 Maine, 271.

⁴ *Smith v. Smith*, 2 Pick. 621; 26 Maine, 234.

⁵ *Farrar v. Greene*, 32 Maine, 574.

⁶ *Moore v. Abbot*, *Ib.* 46.

⁷ *Farrar v. Greene*, *Ib.* 574.

⁸ 32 Maine, 574; *Coombs v. Topsham*, 38 Maine, 204.

(a) See *Batty v. Duxbury*, 24 Verm. 155; *Hull v. Richmond*, 2 W. & M. 337. Under a statute, imposing such liability without this condition, a *turnpike* corporation was held liable for damage sustained in consequence of a *latent* defect in the road, though they used due diligence to discover defects, and keep the road in repair. *Yale v. Hampden, &c.* 18 Pick. 357.

the plaintiff. The defendants are not bound to prove that the injury was caused by his carelessness.¹ Thus, in an action for an injury sustained by the overturning of the plaintiff's carriage, the burden of proof is on the plaintiff, to show that he was at the time driving with ordinary skill and diligence.² (a) So, if the neglect to repair is averred to be *on the sides*, and without the travelled path, and the declaration further alleges, that the plaintiff was injured in turning out to go by a team with a cart-load of wood; he must show that he exercised due care in turning out and passing by, and that the damage arose from the want of proper attention by the town to the sides of the road, and not from himself or some independent accident.³ And the question of negligence, on the part of the plaintiff, is to be determined by the jury, under all the circumstances of the case.⁴ The fact that he had previous knowledge of the defect is not conclusive evidence

¹ *Merrill v. Hampden*, 26 Maine, 234.

² *Hull v. Richmond*, 2 W. & M. 337.

³ *Adams v. Carlisle*, 21 Pick. 146.

⁴ *Bigelow v. Rutland*, 4 Cush. 247.

(a) In an action against a *bridge corporation*, for an injury sustained in consequence of the lamps not being lighted as required by law; the burden of proof is on the defendants. *Worcester v. Canal, &c.* 16 Pick. 541.

Provision is sometimes made by statute, for a town's recovering from the party creating an obstruction in the highway the damages which the town itself has been compelled to pay. In such action, the town is entitled to recover, although defects and want of repairs in the highway may have contributed to the accident which resulted in the injury. *Littleton v. Richardson*, 32 N. H. 59.

The true question for the jury is, whether the incumbrance was the direct and proximate cause of the accident,—that without whose existence it would not have happened. If so, the town may recover, although their negligence may have contributed more remotely to its occurrence, and even although it might have been prevented by a due performance of duty, and the exercise of proper vigilance on their part. *Ibid.*

In New Hampshire, money expended in defending the former suit, cannot be recovered. Nor the expenses of removing the incumbrance. By the terms of the statute, the remedy is limited to the damages and costs paid the person suffering injury. *Ibid.*

of negligence. Nor has the fact that he was an inhabitant of the town and knew of the defect, but omitted to give notice of it to the town, any bearing on the question of the town's liability.¹

44. According to the principle heretofore laid down—chap. 4—a town has been held liable for an injury occasioned by a defect in a highway, and which would not have otherwise occurred, though the *primary* cause is a pure accident, as, for example, the failure of some part of a carriage or harness; provided the accident occur without the fault or negligence of the party injured, and be one which common prudence and sagacity could not have foreseen and guarded against.² So the town may be responsible, though the plaintiff's horse, without the fault of the town, should be running violently at the time, and though the injury might not have occurred but for such violent running. And to account for the violence of his horse, the plaintiff may show that, near the defect where the damage occurred, there was another defect which he had just passed, though without injury.³

45. A declaration for such injury by the plaintiff, that at the time "the plaintiff was walking along and across the highway, in the due prosecution of his business and in a proper manner," is a sufficient allegation, after verdict, that the plaintiff was at the time in the exercise of ordinary care.⁴ Nor is it necessary, in order to enable the plaintiff to give evidence of ordinary care, that his declaration should aver that fact; if it avers that the injury was caused by the defect in the highway.⁵

46. The questions, whether the plaintiff conducted with care and prudence, whether the road was in a sufficient state of repair, and whether the accident occurred mainly through the insufficiency of the road, and entirely without fault on the part of the plaintiff; are held to be questions of fact,

¹ *Tinker v. Russell*, 14 Pick. 279.

² *Palmer v. Andover*, 2 Cush. 600.
See *Hyde v. Jamaica*, 1 Williams, 443.

³ *Verrill v. Minot*, 31 Maine, 299.

⁴ *Raymond v. Lowell*, 6 Cush. 524.

⁵ *May v. Princeton*, 11 Met. 442.

ordinarily mixed, however, with questions of law, requiring comment by the Court. But, how far towns are bound to clear away obstructions, natural or artificial, from that portion of the highway exterior to the wrought way; and how far they shall be held responsible for accidents occurring in travelling over this lateral space, either voluntarily or on account of difficulties existing in the ordinary track, or for such as may occur in consequence of diverging into the neighboring field from a real or supposed necessity, or for such as may arise in attempting to pass a bridge obviously unsafe or dangerous, or in fording a stream in such case; are mainly questions of law, calling for special instructions from the Court. Thus the plaintiff was travelling upon the highway in the village of Montpelier. The travelled path was from twenty to thirty feet wide; in the ditch, and three feet from the outer edge of the travelled path and about five or six feet from the fence, a hole had been dug, about three feet square and two feet deep, of which the highway surveyor had notice. There was nothing between the hole and the fence but an elevated sidewalk. There was some snow upon the sides of the road, but none in the travelled path. Sleighs had been driven in the ditch, and had made a path there upon the snow at the place where the hole was dug. The plaintiff was passing along the highway, in a dark night, with a horse and sleigh, and ran into the hole, whereby his horse and sleigh were injured. Held, the jury should have been instructed, that, if the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of snow, or if the horse took the same direction from a natural instinct, or from inability to see the road, on account of the darkness; the town should not be responsible.¹ (a)

¹ Rice v. Montpelier, 19 Verm. 470.

(a) The rule of the road, of *passing to the right*, only applies to and regulates the conduct of travellers as between themselves. Its violation

47. If a traveller, in the exercise of ordinary care and prudence, voluntarily leaps from his carriage, because of its near approach to a dangerous defect in the highway, and thereby sustains an injury, the town is liable, although the carriage do not come in actual contact with the defect. But these facts do not support a declaration, that the party was "violently thrown from a wagon upon the ground by reason of a defect in the highway;" though the objection ought ordinarily to be taken before the case is submitted to the jury. And if such case is tried and submitted to the jury, entirely upon the hypothesis that the plaintiff was so thrown to the ground; and afterwards, to an inquiry by the jury, the Judge answers, that the action can be maintained, if the plaintiff voluntarily jumped to the ground through imminent peril; a verdict against the defendants will be set aside.¹

48. A traveller, to recover for loss caused by a deficiency in a road, is not obliged to look far ahead, in order to guard against obstructions, which ought not to be suffered to exist. Thus, where a person travelling with a horse and wagon might, from an eminence in the road, have seen that a causeway, at a considerable distance, which he intended to pass over, was covered with water; but, when he descended the hill, the causeway was out of sight, until he had proceeded too far either to turn back or go on with safety; and he then used ordinary care in endeavoring to extricate his horse from the danger, but without success; he may recover for the loss.²

49. Where one, who had occasion to cross, in the daytime, from one side of a street to the other, selected for that purpose a portion of the street, which, having been necessarily and properly appropriated for a drain, was covered by

¹ *Lund v. Tyngsboro*, 11 Cush. 563.

² *Thompson v. Bridgewater*, 7 Pick. 188.

cannot show want of care in regard to defects in the road. *Grier v. Sampson*, 27 Penn. 183.

an iron grating, and, in attempting to cross over the grating, fell and was injured, there being no reason for attempting to cross at that place rather than any other part of the street; this is not ordinary care, and he cannot recover damages.¹ Nor one who goes out of the highway, because of the defect therein, into the adjoining land, and there receives an injury.² But, though there were other streets by which the party might have reached the point he was aiming at, the city is liable, if it did not give notice and warning, by closing up the street out of repair, or in some other way.³

50. With regard to the nature and proof of the *injury*, necessary to maintain an action, it is held, in New Hampshire, that the statute limits the remedy to such injuries as are received by a person, his team, or carriage, directly from the defect, in using or attempting to use the highway as such.⁴ So, by "damage in one's property," within the meaning of the statute of Maine, is intended some injury to an article, by which its value is destroyed or diminished; not a mere loss of time, or an addition to expenses.⁵ But bodily pain is among the items for which compensation is to be made.⁶ And in an action for "bodily injury," the jury may also allow for loss of time resulting from the injury, and for expenses suitably incurred to obtain a cure.⁷ (a)

51. The question of a town's liability is sometimes affected by the actual or supposed responsibility of other parties for the same injury. Thus it is held that such liability is not varied or discharged, though the defect is occasioned by the exercise of the right of an adjoining owner of land, to

¹ Raymond v. Lowell, 6 Cush. 324.

² Tisdale v. Norton, 8 Met. 388.

³ Erie, &c. v. Schwingle, 22 Penn. 384.

⁴ Ball v. Winchester, 32 N. H. 435.

⁵ Weeks v. Shirley, 33 Maine, 271; Verrill v. Minot, 31 Ib. 299.

⁶ Mason v. Ellsworth, 32 Ib. 271.

⁷ Sanford v. Augusta, 32 Ib. 536.

(a) As proof of the injury, groans or exclamations, uttered by the plaintiff at any time, expressing present pain or agony, and referring by word or gesture to the seat of the pain, are admissible for the plaintiff. Bacon v. Charlestown, 7 Cush. 581.

use the street or way for some private purpose, not inconsistent with the right of the public.¹ (a) So the town are primarily liable, although the defect be caused by a railroad corporation, in constructing their road according to their charter.² Or where the railroad is required by its charter so to construct its works as not to obstruct the safe and convenient use of any highway.³ (b)

¹ Bacon v. Boston, 3 Cush. 174.

² Elliott v. Concord, 7 Fost. 204.

³ Phillips v. Veazie, 40 Maine, 96.

(a) When railroads obstruct their highways, towns must provide a suitable and proper by-way around the obstruction, and use proper and reasonable precaution to divert the travel. Such by-way is an open public way for the time being, and the town must make it reasonably safe for the public travel, or see that it is made so by others. And, though the railroad be bound to make the by-ways, and fail to make them safe, this will not exonerate the town. *Batty v. Duxbury*, 24 Verm. 155.

A statutory provision, that it shall be the duty of commissioners of highways, to cause all roads located by them to be constructed and finished to their acceptance, was held not to vary the responsibility of towns for injuries occasioned by defects in highways, nor in any event to give an action against the county. The acceptance by the commissioners, contemplated by the statute, is not the acceptance of the highway, or the act which opens it as a highway for public use, but of the construction of the road. *Bliss v. Deerfield*, 18 Pick. 102.

A town is not liable for injuries happening upon a *ford-way*, lying out of the limits of the highway, and used by reason of the neglect to repair a bridge, although with the consent of the land-owner; if not opened according to statute, or dedicated to, and accepted by the town. The town's neglect to repair the bridge must be the immediate cause of an injury, in order to render it liable therefor. *Hyde v. Jamaica*, 1 Williams, 443.

(b) Municipal authorities have no power to modify or repeal a law, declaring certain streets to be public highways, by consenting to the construction of a railroad thereon. The rights of the public will be protected against the municipal as well as the railroad corporation. *Commonwealth v. Erie, &c.* 27 Penn. 339.

Thus by stat. 1830, c. 4, establishing the Boston and Lowell Railroad Corporation, it was provided, (§ 11,) that, if the railroad should cross any highway, it should be so constructed, as not to impede the safe and convenient use of such highway. Where an excavation was made by such corporation in a highway, for the purpose of constructing the railroad across it, and an

52. But a town is not liable for an injury occasioned to a traveller passing from a public highway to a railroad station, through a road opened by the proprietors of the railroad for that purpose, by a block of stone lying within the limits of the highway, as located, and obstructing the entrance of the road to the station, if it does not obstruct the road-bed of the highway.¹ So, if the proprietors of a railroad, acting within their authority, construct a cattle-guard in their road, at a place where it crosses a highway on the same level; and the town erect and maintain a sufficient and proper barrier against such cattle-guard up to the railroad, and as far as can be done without impeding the passing of cars on the same; the town are not responsible for an injury sustained by a traveller on the highway, in consequence of his falling into the cattle-guard.² (a)

53. With regard to the technical character of, and the pleadings in, the action now under consideration, the action is not an action *respecting an easement on real estate* within the meaning of a statute which uses these terms, and there-

¹ Smith v. Wendell, 7 Cush. 498.

² Jones v. Waltham, 4 Cush. 297.

injury sustained by a person travelling on the highway, in the evening, in consequence of being thrown into the excavation; it was held that the town was liable to an action, although the town had given notice to the superintendent of the work on the railroad, that a barrier must be put up for the protection of travellers on the highway, and such superintendent had promised that this should be done. *Currier v. Lowell*, 16 Pick. 170.

(a) A town is not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair. *Sawyer v. Northfield*, 7 Cush. 490.

The licensing of an individual to occupy a part of a public street exclusively for his own benefit, by erecting and using a railroad for the transportation of rocks and gravel, is not among the powers granted to a city council. No action lies against the city by a person suffering special damage by reason of such railroad, although the party licensed may have given bond to indemnify the city against such damages. *Green v. Portland*, 32 Maine, 481.

fore cannot be commenced in Massachusetts in the Supreme Court.¹

54. It is not necessary to allege in the declaration, that the injurious act or neglect was *contra formam statuti*.² (a)

¹ Hunt v. Hanover, 8 Met. 343.

² Tinker v. Russell, 14 Pick. 279.

(a) In a statutory action to recover double damages of a bridge corporation, for an injury occasioned by a defect in the bridge, it is not necessary to allege that the plaintiff was entitled to double damages, or conclude *contra formam statuti*. But it must be averred that the corporation had reasonable notice of such defect; and the want of such averment is not cured by a verdict for the plaintiff. Worcester v. Canal, &c. 16 Pick. 541.

A count at common law, for an injury sustained in consequence of a defect in a bridge, may be joined with a count on the statute, claiming double damages for the same injury; the form of the action being the same in both counts. Ibid.

In such action the declaration alleged, that the defendants were by law bound to keep the bridge in repair, but not that they were the proprietors thereof, nor that they had any interest or control over it, nor that the bridge authorized to be erected by the act incorporating the defendants was ever built, nor that the bridge mentioned in the declaration was built by the defendants by virtue of such act, nor what kind of bridge it was, nor whether it was public or private, nor that the plaintiff had any right to pass over the same; neither did it set forth or allude to the act incorporating the defendants and creating their liability to repair the bridge. After verdict, it was held that these were merely defects in the *manner* of stating the liability of the defendants, and so were cured by the verdict. Ibid.

In the same action, the declaration contained two counts for the same injury, the first alleging it to have been caused by a defect in the bridge, and also by a neglect on the part of the defendants to light the lamps, and the second count omitting the latter cause. The jury found that both causes were proved, and returned a general verdict for the plaintiff. It was held, that, if the first count was insufficient, judgment might be entered on the second count. Ibid.

In the same action the declaration alleged, that the plaintiff sustained the injury in consequence of a defect in the railing of the bridge. It appeared, that, in repairing the bridge, a portion of the foot-way and railing was removed, in order to allow the travel to pass from the bridge to certain land by the side of the bridge, provided by the corporation temporarily, as the

55. A declaration averred, that the plaintiff, on August 27, 1831, "at Chelmsford, was travelling on a highway in Chelmsford, which highway the town are by law bound to keep in repair, on a part of the highway leading from the dwelling-house of I. S. to the stone guide-post near the Middlesex Turnpike in Chelmsford;" that the highway within such limits was defective and in want of repair; that the plaintiff, "being so travelling as aforesaid, at the time and place aforesaid," sustained the injuries complained of in consequence of such defect and want of repair. After a verdict for the plaintiff, it was held that the declaration was sufficient, although it did not state that the town was bound by law to maintain and repair the highway where the accident happened *at the time of such injuries*, and although there was no direct averment, that the defective part of the road where the accident happened was within the town of Chelmsford, and although there was no allegation that the defect and want of necessary repair were against the form of the statute.¹

56. In regard to the *general liability* of municipal corporations, the doctrine is laid down, that an action sounding in tort may be maintained against a municipal corporation; that such corporation may be liable, in an action of the case, for an act which would warrant a like action against an individual; provided that such act is done by the authority of the corporation, or of a branch of its government, authorized to act for the corporation, upon the subject to which the particular act relates; or that, after the act has been done, it has been ratified by the corporation by any similar act of its officers.² Thus an action on the case was held to lie against the corporation of the city of New York,

¹ Read v. Chelmsford, 16 Pick. 128.

² Thayer v. Boston, 19 Pick. 511.

common travelling path; that this land was enclosed by a fence, through an aperture in which the plaintiff passed and fell overboard. It was held that this was not a variance. Ibid.

for injuries occasioned by the negligent and unskilful construction of a dam on the Croton River, being a part of the works built pursuant to the act for supplying the city with water (Stat. 1834, p. 451); the title to the land upon which the same was erected being vested in the corporation, pursuant to the fourteenth section of the act.¹ So the city of New York was held liable for damages, caused by the breaking down of a vault, built by permission under the street; the injury being occasioned by the negligent and improper act of a contractor, who was building a sewer in the street, under a contract with the corporate authorities, in unduly piling the excavated earth, &c., over such vault.² And it is said, the corporation of the city of New York has no more right to erect and maintain a nuisance on its lands than a private person possesses.³ So a municipal corporation, owning lands on a watercourse from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants.⁴ So, where the vendor of land, in his contract of sale, required the vendee to grade in front of his lot, whenever the vendor might direct, and the town council afterwards graded the street in front of such lot, sinking the street several feet; it was held, that the contract of the vendee did not bar him of his remedy for damages against the corporation, for the injuries sustained by such grading.⁵ So, where the expense of altering the grade of a street was assessed by the common council of a city in an irregular and illegal manner, and the collectors enforced the assessment by seizure of property, it was held that the corporation was liable.⁶ And, in general, municipal corporations are held to be responsible to the same extent, and in the same manner, as natural persons, for the negligence or want of skill of their agents, in the construc-

¹ *The Mayor, &c. v. Bailey*, 2 Denio, 433.

² *Delmonico v. New York*, 1 Sandf. 223.

³ *Brower v. The Mayor, &c.* 3 Barb. 254.

⁴ *Stein v. Burden*, 24 Ala. 130.

⁵ *Akron v. McComb*, 18 Ohio, 229.

⁶ *Howell v. Buffalo*, 15 N. Y. 512.

tion of works for the benefit of their municipalities.¹ Thus a municipal corporation is responsible to individuals, for damages resulting from want of care or skill in their public surveyor, elected by them, by reason of which a bridge on a public highway over a canal was destroyed.² So the corporation of the city of New York is responsible for injuries resulting from the negligence of persons employed by its officers in repairing the public sewers.³ So a municipal corporation, having ordered certain grading to be done in a street and adjoining avenue, and the work being carelessly and negligently performed, is liable in damages to any one who sustains damage from such negligence and carelessness.⁴ But, on the other hand, a municipal corporation, authorized to make ordinances for the good government of its streets and citizens, is held not to be responsible for injuries arising from their neglect or violation.⁵ Thus it is held, that the city of New York is not liable for injuries done to individuals, in the exercise of its authority to direct the pitching, paving, and grading of streets.⁶ So, where the corporation, in grading two public streets which formed an angle in which the plaintiff's premises were situated, raised those streets so as to prevent the water from flowing off, whereby damage ensued to the plaintiff; held, an action on the case could not be sustained.⁷ So the statute, authorizing the corporation to cause common sewers, drains, and vaults to be made, confers discretionary powers as to the time and place of constructing such works; and a private action cannot therefore be maintained against the corporation, for an omission and neglect to construct a particular improvement of this kind, even though wilful. Though, for a neglect to repair existing sewers and drains, by which an individual is injured, an action lies.⁸ So a municipal corporation is not liable for the destruction of a

¹ *Ross v. Madison*, 1 Cart. 281.

² *Dayton v. Pease*, 4 Ohio, N. S. 80.

³ *Lloyd v. The Mayor, &c.* 1 Seld. 369.

⁴ *Lacour v. Mayor, &c.* 3 Duer, 406.

⁵ *Levy v. New York*, 1 Sandf. 465.

⁶ *Wilson v. The Mayor, &c.* 1 Denio, 595.

⁷ *Ibid.*

⁸ *Ibid.*

building in order to stop the progress of a fire, except by virtue of an express statute.¹ Nor for injuries done by a mob.² And, in order to charge a corporation for negligence, in the performance of a public work, the law must have imposed a duty on it, so as to make that neglect culpable. Thus the trustees of the village of Plattsburgh, when in performance of their duty as commissioners of highways, act under the several laws regulating highways, and are an independent set of officers, altogether beyond the control of the village corporation. Hence the village is not liable for damages sustained by an individual, in consequence of one of the streets of the village being out of repair.³ So, although the officers of a city are appointed by a corporation, they are *quasi* civil officers of the government, and are personally liable for malfeasance or nonfeasance in office, but for neither is the corporation responsible.⁴ Upon these grounds, where the corporation of a city, by virtue of a power granted, but not wantonly or unnecessarily, caused to be opened a ditch, sewer, or culvert within and upon the sidewalks thereof; held, that an action could not be sustained by one whose property had sustained damage in consequence of the work.⁵ Nor for grading a street, and turning the water from a natural gully upon the land of the plaintiff, causing him great injury.⁶ So the city of St. Louis was held not liable, for digging a ditch by authorized agents, under her proper ordinances, injurious to another, if not done carelessly.⁷

57. A very frequent form, of the liability of a corporation for tort or wrong, is found in the case of a charter, granted for some specific purpose of public or private improvement, and involving the doing of certain acts connected with individual property, by the neglect or improper performance

¹ *Correas v. San Francisco*, 1 Cal. 452.

² *Prather v. Lexington*, 13 B. Mon. 559.

³ *Hickok v. Plattsburgh*, 15 Barb. 427.

⁴ *Prather v. Lexington*, 13 B. Mon. 559.

⁵ *White v. Yazoo*, 27 Miss. 357.

⁶ *St. Louis v. Gurno*, 12 Mis. 414.

⁷ *Lambar v. St. Louis*, 15 Mis. 610.

of which such property is injured. Thus one injured by the decay of sea-walls, which a corporation is directed to repair, under a grant from the crown, conveying a borough, and pier or quay, with tolls, to the corporation, may sue the corporation for damages.¹

58. Although the statute itself may prescribe a remedy for parties injured, yet a common-law liability may arise, upon which an action on the case may be maintained. Thus an act of Parliament constituted a company, for the purpose of making and maintaining a navigable canal, which all persons were to be allowed to use on payment of certain tolls. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up without loss of time, that it should be lawful for the company to do so, and to keep the same till payment made of the expenses for so doing. Held, the act did not make it compulsory upon the company, after notice, so to weigh up a sunken vessel; but, as the company had made the canal for their profit, and opened it to the public upon payment of tolls, a duty was imposed on them, at common law, to take reasonable care to prevent danger to the navigation; and therefore they were liable in case, for neither weighing up nor giving notice of a sunken vessel, which damaged a boat navigating their canal. Also, that such duty need not be expressly alleged; but only facts from which the duty can be necessarily implied.²

59. So the provisional committee of a water-works company agreed with the plaintiff, on his withdrawing his opposition to their bill in Parliament, to purchase lands for the works at a fixed sum per acre, including damage for severance, and, in addition, to pay for any damage the plaintiff should sustain, from the water of the company being near his house or buildings, and also to make good to the plaintiff or his tenants all loss or damage to any property belong-

¹ *Henley v. Mayor, &c.* 4 Bing. 91.

² *Lancaster, &c. v. Parnaby*, 3 P. & D. 162.

ing to or in the occupation of him or them, which the company might not purchase, (except damage occasioned by severance,) whether caused by the order or neglect of the company; the damage to be assessed by certain arbitrators. The local act was obtained, and it incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid, and the compensation money under the above heads was ascertained by the arbitrators, and paid to the plaintiff. The plaintiff subsequently brought an action against the company, for taking so little care of a reservoir, that the water oozed out over the plaintiff's land, causing offensive smells and vapors, and rendering his buildings damp and unwholesome, and permanently injuring them, and for obstructing a drain and thereby penning back the sewerage of the plaintiff's house; and, further, because a drain, whereby the plaintiff's adjoining house and lands were drained, was interrupted and rendered useless, and the defendants neglected to substitute another drain according to their duty, whereby the plaintiff's house and lands were insufficiently drained; and also, for cutting a channel across, and thereby, and also by means of the defendant's reservoir and works, depriving the plaintiff of the use of an agricultural road, forming a communication between lands of the plaintiff, and for not substituting another road in lieu of it; and also by the reservoir and works obstructing a public footpath and depriving the plaintiff of the use of it, and thereby causing him particular damage and inconvenience. Held, that the action was maintainable, the damages not being those directed by the act to be settled by arbitration, or such as were contemplated by, or within the scope of, the agreement. So, although the defendants had no notice that the interrupted drain was for the drainage of the plaintiff's house, or that the plaintiff required any substituted drain; and although the plaintiff had not required any way to be substituted for the occupation road. But, that a claim for raising the level of a stream, so as to check its accustomed

speed at the place where it arrived at the plaintiff's lands, might be a loss included in the arbitration; and that a plea of an award of a certain sum therefor was good in part, although it professed to cover some of the other claims, to which it was no answer.¹

60. But, in general, the remedy prescribed by the statute is held to be exclusive. Thus, in 1793, a corporation was created, with power to make a navigable canal from Merrimack River to Medford, and for that purpose to appropriate private property; and, in order that no person might be damaged by their diverting watercourses or flowing his land, a special mode was pointed out, for ascertaining and securing payment of such damages:—the corporation to take a prescribed toll; and if, in ten years, it should not be completed so far as to be passable, the act to be void. By two subsequent acts, the corporation were authorized to continue the canal to Charles River; and, within the time last fixed, the canal was opened to the public use and the toll taken. The corporation had erected a dam across a river, to form a feeder for the canal, and, after the canal had been open for more than twenty years, erected a new dam, just below the first one, but to a greater height, by which lands were overflowed and damaged. Held, there was no limitation of time for exercising the power to use the river for the necessary supply of the canal; that such limitation could not by necessary implication be deemed to have taken effect when the canal was first opened, because the necessity did not then cease; and, if the like power was necessary to the continued use of the canal, as it was originally made or had since been made, without objection on the part of any person interested, the power also must continue, and of the public necessity and expediency of using this power, the corporation were constituted the judge; and, consequently, that the owner must pursue his statutory remedy, and could not maintain an action at common law.²

¹ *Cawkerell v. Russell*, 38 Eng. L. & Eq. 35.

² *Sudbury, &c. v. Middlesex, &c.* 23 Pick. 36.

61. But, in order to charge a corporation for negligence in the performance of a public work, the law must have *actually*, not merely in form, imposed a duty or conferred an authority to do such work. Hence, where the officers and agents of a city corporation assumed to build a bridge, under the authority of a statute not constitutionally passed for want of a two thirds vote, and the bridge fell in consequence of the negligent construction thereof; held, the corporation was not liable to an action at the suit of a person injured by the accident.¹

62. A canal act provided, that the canal company should not be entitled, on purchasing lands for making a canal, to any coal-mines, &c., under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal; and that the company might inspect the mines, and might stop the further working of them, paying compensation to the owners. Held, that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the company, the latter did not purchase out their rights, and that, the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the company in not purchasing.² Otherwise, where the canal act provided, that, in working such mines, no injury should be done to the canal.³ Or where the house of one claiming under a grant from the owner of the soil was undermined by him.⁴

63. In the same connection, we may refer to the rights and liabilities of individuals, in reference to injuries done to private property, by means of acts which they are authorized by statute to perform. The privilege and duty created by

¹ The Mayor, &c. of Albany v. Cauliff, 2 Comst. 165.

² Wyley v. Bradley, 7 E. 368.

³ Ibid.

⁴ Earl of Lansdale's case, Ib.

such statute are analogous to those growing out of a corporate charter. One question in relation to this subject has been, whether such liability is joint or several. Thus where, by statute, the inhabitants of the hundred were to make satisfaction for damages occasioned by the acts therein mentioned; held, the action must be against all the inhabitants.¹ But, by a turnpike act, trustees were appointed, with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. It was also provided, that all actions, for anything done in pursuance of the act, should be brought within six months after the doing the thing complained of. A drain was cut, by an order signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter was overflowed; and an action was brought against one of the trustees only, more than six months after the act done, and the first injury sustained; but within six months after a subsequent injury accrued. Held, that the action, if it could have been supported at all, was well brought against the defendant only; but that the trustees, having acted to the best of their skill, and with the best advice, were not answerable.²

64. By the general turnpike act, the trustees of roads were authorized to divert, shorten, alter, or improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering or making satisfaction to the owners thereof and persons interested therein, for the damage sustained thereby. Held, that the trustees were authorized to lower hills and raise hollows; and were not liable to an action for a consequential injury resulting therefrom.³

65. By a local act, (3 & 4 Vict. c. 55,) commissioners were appointed for improving a navigation; all their powers to be executed by the majority present at a meeting of not

¹ Jackson v. Pearson, 1 B. & C. 304.

³ Boulton v. Crowther, 2 B. & C. 703.

² Sutton v. Clarke, 1 Marsh. 429.

fewer than three. They were not to be personally liable on contracts made, or for damages incurred, in relation to anything done in pursuance of the act, but might be sued in the name of their clerk. The commissioners, at a meeting duly held, (November 12,) resolved to accept a tender for executing works in pursuance of the act; and their clerk thereupon drew up a contract according to the tender; and it was afterwards (December 4) signed by the contractor. It purported to be made by A., B., and C., "being three of the commissioners" appointed for putting the act in execution, and recited the previous resolution; but it did not appear (unless as before mentioned) that the contract was executed or sanctioned by the majority of a regular meeting. Held, that the contract, made in consequence of the above resolution, was a contract entered into by the commissioners in execution of their office; and that they were liable, and might be sued in the name of their clerk, for damage negligently done by the contractor to third persons in execution of such contract. But where the contractor, in executing part of the work, the diversion of a creek, made a drain, which, from a defect in the materials, could not resist water; and, without authority, turned in the water, which broke through and flooded the neighboring land; and the drain was not finished at the time, but it did not appear that anything further was about to be done for the purpose of securing it, if the mischief had not happened; it was held, that the defendant was not liable.¹

66. By one clause of a local improvement act, power was given to commissioners "to cause the present and future streets, &c., and other public places to be paved, &c., and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner as they should think fit." By other clauses, the commissioners were authorized to give notice to the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring

¹ *Allen v. Hayward*, 7 Ad. & Ell. N. S. 960.

them to pave and flag the same, and, in case of their neglecting to do so, to pave and flag the same, and to recover the expenses from the owners or occupiers, and to declare the streets highways, and take upon themselves the future paving of them; but not to alter the level of the streets. Held, they were not authorized to cut down a steep ascent, and greatly lower the level of the street opposite the plaintiff's house, but were liable in trespass.¹

67. A statute, for making certain rivers navigable, gave the undertakers power to make new cuts, &c., for the purpose of improving the navigation, but required them to make compensation to the land-owners, according to the determination of commissioners, or agreement between the parties; but gave the undertakers no power to purchase lands, nor recognized in them any right of soil in the beds or banks of the rivers. A river, mentioned in this act, was made navigable by certain undertakers, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks, by cutting bushes, &c., and granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto, for the purpose of irrigation; but there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank. Held, such an agreement could not be presumed from these acts of ownership, when opposed to similar acts exercised by the occupier of the adjoining land; and that the act of Parliament afforded strong evidence against such presumption. Also, that evidence of acts of ownership and enjoyment, exercised by the undertakers on other parts of the line of the navigation, was inadmissible to show their title to the *locus in quo*, unless unity of title and character between the *locus in quo*, and the other parts of the line of navigation, was previously established.²

¹ *Brown v. Clegg*, 6 Eng. L. & Eq. 334.

² *Hollis v. Goldfinch*, 2 Dowl. & Ry. 316.

CHAPTER XXVI.

MASTER AND SERVANT.

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| 1. Whether master and servant are jointly liable.
3. General liability of a master or principal—for wilful wrongs of the servant—trespass.
5. Liability for negligence of the servant.
11. Distinction between a servant and a contractor.
16. Liability of public officers.
17. Of corporations, &c. | 18. Liability for fraud of an agent or servant.
20. Liability of a servant—to third persons.
22. To the master.
24. Liability of master to servant.
27. Actions by master and servant against third persons.
28. Action by master for loss of service of the servant, &c.
32. Attorneys. |
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1. In immediate connection with the subject of *joint* claims and liabilities, may be considered those which grow out of the common and familiar relation of *master and servant*, or *principal and agent*.

2. It has been sometimes held, that master and servant may be joined as defendants in one action. Thus, in an action on the case for obstructing the plaintiff's lights, a clerk who superintended the erection of the building by which they were darkened, and who alone directed the workmen, may be joined as a co-defendant with the original contractor.¹ So a railroad company, authorizing the blasting of rocks by its contractors upon the proposed line of its road, is liable as joint wrongdoer with the contractors, for any damage done by fragments of stone to adjoining premises, although there was no want of care in the manner in which the work was done.² And more especially may the injury be regarded as joint, where by agreement between the parties they are to be jointly inter-

¹ *Wilson v. Peto*, 6 Moore, 47.

² *Carman v. Steub. & Ind. Railroad*, 4 Ohio, 399.

ested in the property which is the subject of such injury. Thus, where A.'s negroes were purchased from a third person by B., on the joint account of himself and C.; and, after notice of A.'s title, B. sold the negroes for the benefit of himself and C.; it was held, in trover by A. against C., that the sale by B. was a conversion by both B. and C.¹ But an action on the case does not lie against a master and servant jointly, for a wilful injury done by the servant, whilst driving the carriage of the master, if such carriage be not employed in the conveyance of passengers, and the master be not present when the injury occurs.² (a) It is to be further remarked, that in some cases a party may elect, whether to proceed against the master or the servant. As where money is paid to a servant, and he misapplies it.³ And a party injured may sometimes proceed against the master and servant *successively*; and the latter has been held to be concluded and estopped by the result of proceedings against the former. Thus where, in an action of trover, the defendant justifies the taking by the command and under title of one A., he is to be regarded as a privy of A.; and the record of a former recovery by the plaintiff against A. for the same taking is admissible in evidence against the defendant; and is conclusive as to the plaintiff's title and right of possession.⁴ But, on the other hand, in an action for a trespass, committed by the defendant, as servant and by command of A., acceptance of satisfaction by the plaintiff from A. is a defence.⁵ In general, however, different forms of action are adopted against master and servant. Thus an action on

¹ *Guerry v. Kerton*, 2 Rich. 507.

⁴ *Calkins v. Allerton*, 3 Barb. 171.

² *Wright v. Wilcox*, 19 Wend. 343.

⁵ *Thurman v. Wild*, 11 Ad. & Ell.

³ *Cary v. Webster*, 1 Str. 480.

453.

(a) It has been held that a sheriff is jointly liable with his deputy, though not present at the taking of the property. *King v. Orser*, 4 Duer, 481. See p. 351.

More especially, that a sheriff, who ratifies the wrongful act of his deputy, is liable to be sued with the latter as a joint trespasser. *Waterbury v. Westervelt*, 5 Seld. 598.

the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage, by the servant of the defendant negligently driving his carriage against it.¹ (a)

3. In general, a master is liable for the *fault or negligence* of his servant; (b) but not for his *wilful wrong or trespass*.² (c)

¹ Morley v. Gaisford, 2 H. Black. Terry, 1 B. Mon. 96; Brooks v. Olmstead, 17 Penn. 24; 29 Eng. L. & Eq. 442.

² Jones v. Hart, 2 Salk. 440; 323; Acc. Grant v. Norway, 10 Com. B. 665; Hurharty v. Ward, 8 Exch. 330.
M'Guire v. Grant, 1 Dutch. 356; Coleman v. Riches, 16 Com. B. 104; Mitchell v. Mims, 3 Tex. 6; Ferguson v.

(a) See *Trespass; Action on the Case; Supra*, vol. i. p. 97.

(b) More especially is the master liable, if himself guilty of the negligence which causes the injury. Thus a master is liable for an accident resulting from the breaking of the chain-stay of a cart driven by his servant, on account of his negligence in not having the tackle good. *Welsh v. Laurence*, 2 Chitty, 262.

(c) Thus a master is not liable in trespass for the wilful act of his servant, by driving his master's carriage against another, done without the direction or assent of the master. *M'Manus v. Crickett*, 1 E. 106.

If a servant, while felling trees by the orders of his master, and in the scope of his business, trespass upon another's land, either wilfully or negligently; the master is liable. *Luttrell v. Hazen*, 3 Sneed, 20..

Trover lies against a master, for goods delivered to his apprentice, and wrongfully converted by him. *Armory v. Delamirc*, 1 Stra. 505.

In reference to the peculiar nature of the master's liability, for injuries caused by the driving of animals and the use of carriages, and the distinction between the actions of trespass and case, as applied to this class of injuries, it is said: "Liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless the act was done by his command; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of. But when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master are placed in the care and under the management of a servant or rational agent. In all cases where a master gives the

The injury must arise in the course of the execution of some service lawful in itself, but negligently or unskilfully performed; and not be a wanton violation of law by the servant, although occupied about the business of his employer.¹ It must appear, either that the master commanded the unlawful act, or that the injury resulted from the negligence of the servant, while he was actually employed in his master's service.² Or that the injury was the natural and probable result of the orders given to the servant.³ Or, unless the act was done in the master's name and for his benefit, that he assented to or ratified it, with a full knowledge of the facts.⁴ (a) It is said: "He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit; and then his agreement subsequent amounteth to a commandment."⁵ "An act done for another by a person not assuming to act for himself but for such other person, though without any precedent authority, becomes the act of the principal, if subsequently ratified by him, whether it

¹ *Moore v. Sanborne*, 2 Mich. 519.

² *Douglass v. Stephens*, 18 Mis. 362.

³ *Thames, &c. v. Housatonic*, &c. 24 Conn. 40.

⁴ *Fox v. Jackson*, 8 Barb. 355; *Van-*

derbilt v. The Richmond, &c. 3 Comst.

479; *Van Brunt v. Schenck*, 13 Johns.

414; *Fitzsimmons v. Joslin*, 2 Verm.

129; 1 Pars. on Cont. 47, n.

⁵ 4 Inst. 317.

direction and control over a carriage, or animal, or chattel to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent." *Sharrod v. North Western*, &c. 4 Exch. 580.

The plaintiff's horse, in charge of his servant, who was guilty of no negligence, was killed by reason of a span of horses, belonging to the defendant, which had run away with his coachman, running against a feed wagon. Held, although the defendant's servant was guilty of no fault or negligence, yet the defendant was liable, if the servant caused the injury by running against the wagon, though solely with a view to his personal safety, provided the act was a prudent one for the purpose of stopping the defendant's horses. *Wolfe v. Mersereau*, 4 Duer, 473.

(a) It has been doubted (2 Greenl. Ev. § 68) whether there can be a trespass by ratification.

be for his detriment or his advantage.”¹ And the principle has been applied so far, as to exempt the servant from liability, for acts approved and adopted by *government*. Thus, in trespass by a slave-dealer, resident and carrying on his trade on the coast of Africa, against a commander in the British navy on that station, whose duty it was to enforce a treaty with Spain for suppression of the slave-trade, for carrying off slaves of the plaintiff; the defence was, not any previous authority to do the act, but an alleged subsequent ratification by the government. Held, the action could not be maintained.² So a steamboat of the plaintiffs took fire in the night, while fastened by the plaintiffs’ cable to the defendants’ wharf, upon which stood an old wooden freight-house; but, before the house was in danger, and while the fire could have been extinguished, the cable was cut by the defendants’ watchman, without any express authority, and the boat drifted away and was burned. Held, the defendants were not liable to an action of trespass.³ So, if the servants of a railroad company, exceeding their authority, unlawfully expel a passenger from the cars; the company is not liable;—nor for any unnecessary violence in ejecting a passenger.⁴ So an incorporated district is not liable in trespass, for the illegal seizure of a horse of the plaintiff, by one of its officers, on account of an alleged violation of one of its ordinances, which did not in fact take place; unless the corporation previously authorized or subsequently ratified the seizure.⁵ So the distinction is made, that where the defendant’s servant wantonly, and not in order to execute his master’s orders, strikes the plaintiff’s horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable.⁶ So, to trespass for taking

¹ *Wilson v. Tamman*, 6 M. & Gr. 236.

² *Buron v. Denman*, 2 Exch. 167.

³ *Thames, &c. v. Housatonic, &c.* 24 Conn. 40.

⁴ *Hibbard v. N. Y. &c.* 15 N. Y. 455

⁵ *Fox v. Northern Liberties*, 3 W. & S. 103.

⁶ *Croft v. Alison*, 4 B. & Ald. 590.

the plaintiff's horse, the defendant pleaded, first, not guilty; and secondly, that the horse was *damage feasant* on his land; and the horse was proved to have been wrongfully distrained by the servant of the defendant on the highway, and not on his land. Held, that no *prima facie* case was made out, that the defendant had authorized the distress, by proof that he had on other occasions authorized his servant to distrain cattle *damage feasant* on his land; and that he had not adopted the act of his servant by pleading a justification of it.¹ And the rule requiring approval or adoption by the master more especially applies, where the party doing the act was not the *immediate* servant of the defendant. Thus the plaintiff's boat was run into and damaged by the wilful act of the captain of the defendant's boat. The trespass was also sanctioned and approved by the president of the defendant's corporation, and the general agent and manager of its business. Held, the corporation was not liable for the collision.²

4. A master may be held liable as a trespasser, for the act of his servant done *in his presence*. Thus trespass lies against a master, where, while the servant drives him in a gig, the horse runs away and does damage.³ So the defendant and others hired for a day's excursion a carriage and post-horses, driven by postilions, who were the servants of the owner of the horses. The defendant rode upon the box. The postilions, in endeavoring to force their way into a line of carriages, overturned a gig, and injured the plaintiff. The defendant, at the time, and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened. Held, that he was liable in trespass.⁴ And, under similar circumstances, an action on the case may also be maintained. Thus A. borrowed of the plaintiff a horse and chaise, and went in it, accompanied

¹ Lyons v. Martin, 3 Nev. & Per. 509; 8 Ad. & Ell. 512; S. C. Wil. Vol. & Hodg. 149.

² Vanderbilt v. The Richmond, &c. 2 Comst. 479.

³ Chandler v. Broughton, 3 Tyr. 220.

⁴ M'Laughlin v. Pryor, 4 M. & Gr.

by B., on an excursion of pleasure, B. driving. By B.'s mismanagement, the horse and chaise were driven against and injured the plaintiff's horse. Held, that an action on the case might be maintained for the injury against A., on a declaration charging that he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned.¹ It is to be observed, however, that, where it is sought to charge A. for the wrongful act of B., done at his request and by his direction, it is not competent to inquire of B., whether he would have done the injury had he not *understood* from A. that he would pay the damage, and whether he did the act with the *understanding* from A. that he would pay the damage. The understanding of B. can be learned only from the transaction itself, including what was said between A. and B. in relation to it, and all the accompanying circumstances. It is to be inferred from such evidence, and the inference belongs exclusively to the Court. And it is at least necessary, in order to charge A., that it should appear that he said and did what would amount to a request or direction; and from which it might be inferred that it was so understood both by A. and B.²

5. With regard to that class of wrongs for which, as above explained, a master is responsible, it is said, the legal maxim, *respondet superior*, is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.³ (a) That where either

¹ *Wheatley v. Patrick*, 2 M. & W. 650. ³ Per Best, C. J., *Hall v. Smith*, 2 Bing. 160.

² *Rich v. Jakway*, 18 Barb. 357.

(a) Such being the foundation of the rule, it does not apply to a mere statutory liability. Thus a master is not liable, under the *Massachusetts Rev. Stats. c. 51, § 3*, for the damages sustained by any party, by reason of the omission of his servant seasonably to drive the master's vehicle to the right of the middle of the travelled part of a road, when meeting another vehicle. *Goodhue v. Dix*, 2 Gray, 181.

party to a transaction made with an agent, is to suffer by his neglect, it should be his principal.¹ Hence a master is liable for the act of his servant, done in the course of his employment about his master's business;² but not for the act of his free servant done outside of his employment.³ And though, if the servant be in the performance of, and intrusted with, the ordinary business of his master, the master is chargeable in trover for a wrongful conversion by the servant; the mere fact that he was the servant of the defendant is not sufficient to charge him.⁴

6. It is not necessary that there should be any express assent or agreement on the part of the master, in the par-

¹ Nicoll, &c. 3 W. & M. 529.

² Priestler v. Angley, 5 Rich. 44.

³ McClenaghan v. Brock, 5 Rich. 17.

⁴ Arthur v. Balch, 3 Fost. 157.

In case of the master's liability, the act is treated as virtually that of the master himself, and may be so alleged. Thus, in an action for negligently driving a cart against the plaintiff's carriage, it may be stated in the declaration as the act of the master, though in fact it be the act of the servant. *Brucker v. Fromont*, 6 T. R. 659.

Upon the same principle, where the declaration states, that, whilst the plaintiff was crossing a certain street, the defendants, by their servant, negligently drove and injured the plaintiff; the defendants, under not guilty, may show that the driver was not acting as their servant. *Mitchell v. Crassweller*, 16 Eng. L. & Eq. 448.

Where an action cannot be maintained against a party, unless there has been *personal negligence* on his part, it is not enough to show that he has ordered work to be done, not necessarily amounting to a nuisance, nor causing injury, but in the course of which an injury is accidentally inflicted, although he did not give any special direction to adopt a particular precaution which might have prevented it; for it must be taken that he gave general directions to do the work in a proper manner, and to adopt all proper precautions; and the neglect of any such precaution, even assuming it to be negligence, which might, under ordinary circumstances, render the employer legally liable, is not his *personal* negligence; so that he would not be liable for an injury sustained in such a case by one of his own workmen, or in a case in which a statutable defence was raised, on the ground that there was no negligence on the part of the defendant "otherwise than by his servants or workmen." *Scott v. Mayor, &c.* 38 Eng. L. & Eq. 477.

ticular transaction brought in question, in order to charge him for the act of the servant. Thus "for the acts of a man's own domestic servants there is no doubt but the law makes him responsible."¹ So, where the plaintiff, *according to the common course of dealing*, delivers to the defendant's servant an ingot of gold to assay; if it is not returned, he may bring trover against the master, after a demand and refusal.² So, where a person occasionally employed by the defendant as his servant, being sent out by him on his business, takes the horse of another person, in whose service he also worked, and, in going, rides over the plaintiff; it is a question for the jury, whether the horse was taken by the servant with the implied consent or authority of the defendant; in which case the defendant is liable.³ And, with regard to the frequent case of *deviation* from the servant's regular employment, it is said: "No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance."⁴ So it is held that a master is liable, although the servant acted in direct violation of his orders, if in the course of his employment as a servant. As where an injury occurred in consequence of leaving a truck in the street, which the servant was ordered to place upon a lot provided for that purpose; the servant being rightfully in possession of the truck and about his master's business. So if the servant should carelessly drive against a carriage, although ordered to drive carefully and avoid coming in contact with

¹ Per Littledale, J., *Laughler v. Pointer*, 5 B. & C. 547.

² *Mead v. Hamond*, 1 Str. 505.

³ *Goodman v. Kennell*, 1 Moo. & P. 241.

⁴ Per Jervis, C. J., *Mitchell v. Craswell*, 13 Com. B. 237.

any carriage.¹ So the master is liable for an act done in *misunderstanding* of his orders. Thus where a principal directed his agent to get a team of horses, intending that he should first obtain the owner's permission, which he, through a misunderstanding, failed to do, but took them without leave, and in using them killed one, it was held that the principal was liable for the value of the horse.² (a) So a master is equally liable, where proper instructions have not been given to the servant, or such instructions have been disregarded. Thus the defendant was the owner of boards, which were piled in the mill-yard of a saw-mill, near to a pile of boards belonging to the plaintiff, and sent a man in his employment to draw away his boards, and directed him to call upon the sawyer to inform him which were the defendant's boards. The person sent having obtained information of the sawyer, and supposing he was obtaining the defendant's boards, drew away the boards of the plaintiff with those of the defendant. Held, the defendant having sent his hired man, to follow such instructions as he might obtain from the sawyer, and he having received such instructions as induced him to take away the plaintiff's boards, it was the same as if the defendant had given the instructions himself, and the defendant was liable in trespass for taking the boards, whether the fault was in the sawyer, in not giving sufficiently specific instructions, or in the hired man, in not properly apprehending or following them.³ So a master

¹ Per Fletcher, J., *Powell v. Deveney*,
3 Cush. 304, 305; *Philadelphia, &c. v.*
Derby, 14 How. 468.

² *Moir v. Hopkins*, 16 Ill. 313.

³ *May v. Bliss*, 22 Verm. 477.

(a) But, in an action brought under the Illinois "act to prevent trespassing by cutting timber," it is necessary to show that the act has been wilfully violated, by proof that the defendant, in his own person, cut the trees, or induced another person to do so, by his command or authority. It is not sufficient to show, that the trees were cut by persons employed by him to cut timber on his own land, and appropriated by them. *Cushing v. Dill*, 2 Scam. 460.

may be liable in trespass for any act done by his servant, even in the course of executing his orders with ordinary care; as where a master ordered a servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall.¹ So, where the defendant's slaves took timber and sawed it, without or against his orders, or by mistake; yet, if the lumber when sawed came to the defendant's use, either by being sold or otherwise appropriated to his benefit, however innocently on his part; this is a conversion, and renders the master liable in trover.² But, though a master is responsible for an injury resulting from the negligence of his servant whilst driving his cart or carriage, if the servant is at the time engaged in his master's business, even though the accident happens in a place to which such business did not call him; it is otherwise, if the journey upon which the servant starts be solely for his own purposes, and undertaken without the knowledge or consent of his master. Thus the defendants' carman, having finished the business of the day, returned to their shop in Welbeck Street, with their horse and cart, and obtained the key of the stable, which was close at hand; but, instead of going there at once, and putting up the horse, as it was his duty to do, he, without his master's knowledge or consent, drove a fellow-workman to Euston Square; and, in his way back, ran over and injured the plaintiff and his wife. Held, that, inasmuch as the carman was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorized act.³ (a) So

¹ Gregory v. Piper, 9 B. & C. 591; ² Mitchell v. Craswell, 13 Com. B.
⁴ Man. & Ry. 500. 237; 16 Eng. L. & Eq. 448.

³ Lee v. McKay, 3 Ired. 29.

(a) The declaration alleged, that "the defendants were possessed of a certain cart and horse, which was being driven by and under the care and direction of their servant," not saying, "at the time of the grievance com-

it has been held, that, if one employs another to do an act which may be done *in a lawful manner*, and the latter, in doing it, unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. Thus the defendant employed A. to construct a drain in a highway; A. employed B. to fill in the earth over the brick-work, and to carry away the surplus; and B., in performing his work, left the earth raised so much above the level of the road, that the plaintiff, driving by in the dark, was thereby upset, and sustained injury. Held, that the defendant was not responsible.¹ So it is held, that, where work is done for a railway company under a contract, (parol or otherwise,) the company are not responsible for injury resulting from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done.² (See sect. 11.) And, upon the general principle *in pari delicto*, &c., (see chap. 4,) it has been held that a master will not be liable for the act of a servant employed on the express recommendation of the plaintiff. Thus if an officer, having attached goods on mesne process, delivers them for safe keeping to a bailee appointed by him on the nomination of the plaintiff, he is not responsible for the fidelity of the bailee.³ (a)

¹ Peachey v. Rowland, 13 Com. B. 182.

² Steel v. South Eastern, &c. 16 Com. B. 550; 32 Eng. L. & Eq. 366.

³ Dorham v. Wild, 19 Pick. 520.

plained of;" and that, "whilst the plaintiff was crossing a certain street, &c., the defendants, by their servant, so negligently and improperly drove and directed the said cart and horse along the said street, that the plaintiff was knocked down and injured." Held, that the first allegation was immaterial, and not traversable; and that, under "not guilty," the defendants might show that the driver was not at the time of the accident acting as their servant. 13 Com. B. 237.

(a) But it is not necessary, in order to render the master liable, that the loss or injury should have occurred solely through the neglect of the servant. Thus a colt strayed from a field on to a public road, abutting upon which was a yard, not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was being

7. But, on the other hand, to constitute one the servant of another, with reference to a liability for the wrongful acts of the latter, it is not necessary that the former should be in his regular, standing employ. It is sufficient that he is employed for the particular work in connection with which the injury is done; and very many of the reported cases are of this description. Thus the defendant employed A. to clean out a drain on his land. A. was not in the defendant's service, but was a common laborer, selected by the defendant, on account of his having dug the drain originally. A. cleaned out the drain alone, and without further direction or inspection of the defendant, and received five shillings for the job. In the course of cleaning out the drain, A. took up part of an adjoining highway, and replaced the same in an improper manner and with insufficient materials, in consequence of which the plaintiff's horse, passing along the highway, was injured. Held, A. was not an independent contractor, but was acting as the servant and under the control of the defendant, and that the defendant was responsible to the plaintiff for the injury.¹ (a) But if one temporarily hires the

¹ Sadler v. Henlock, 4 Ell. & Black. 571.

driven back to the field by the servants of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train. Held, that the company were responsible. *Midland, &c. v. Daykin*, 33 Eng. L. & Eq. 193.

(a) But a person will not be held responsible as a *master*, merely on the ground that he commenced certain work, which was afterwards pursued by others, in consequence of whose negligence an injury was caused. Thus, where a person is employed to do any work in a highway, street, or common staircase, and for the convenience of his operations makes an opening there, or places anything there which may be dangerous if left unsecured, and then goes away for a time, leaving his work unfinished, with the intention of returning to finish it at a future period, and in the mean time other workmen are using the opening, &c., for their operations; it is the duty of the latter to secure the opening, &c., at night; and, if they do not, they, and not the person who originally made the opening, are liable in damages for any accident which may happen from their neglect. *Milne v. Smith*, 2 Dow, 390.

servant of another, the latter is responsible, as the general master, for an injury resulting from the negligence of the servant. Thus, where A., the owner of a carriage, hires four post-horses and two postilions of the defendant, a livery-stable keeper, for the day, to take him from London to Epsom and back; and in returning, the postilions damage the carriage of the plaintiff, the defendant, as owner of the horses and master of the postilions, is liable to the plaintiff for such damage.¹

8. As in the class of injuries heretofore considered, which fall more properly under the class of *trespasses*, so also in cases of mere *negligence*, the personal presence of the master has been sometimes held an important consideration in reference to his liability. Thus the defendant, an engineer, being employed by A. to erect a steam-boiler and other apparatus on premises adjoining to the manufactory of the plaintiff, and, in consequence of the explosion of the boiler from the insufficiency of the materials, the property of the latter being injured; and it being found by the jury *that the defendant was personally present*, and that his servants had the management of the apparatus at the time of the accident; held, the plaintiff might maintain case against the defendant.²

9. The liability of a master may depend somewhat upon the question, whether he receives the benefit of the *consideration* paid in connection with the act which causes the injury. Thus it has been held that the master of a stage-coach is not chargeable for goods lost by the driver, unless the master takes a price for the carriage of goods; although money be given to the driver as a gratuity.³ Upon similar ground, where the plaintiff was in the store of the defendant *as a customer*, and a clerk invited her to walk into a dark part of the store, in which there was an open trap-door, through which she, without negligence on her part, fell and broke her arm;

¹ Smith v. Lawrence, 2 Man. & Ry. 1.

² Middleton v. Fowler, 1 Salk. 282.

³ Witte v. Hague, 2 D. & Ry. 33.

it was held that the defendant was liable.¹ And the same consideration may determine, whether the relation of master and servant actually exists in relation to the transaction in question. Thus an employer made a bargain with his employee, to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, nor to render any assistance, pecuniary or otherwise, in the cutting or running of the logs. Held, the relation of master and servant did not exist, and that the employee alone was liable for any injury occasioned to others, by his conduct in performing his contract.²

10. A master is liable for the negligence of servants employed by his own servant. Thus, in reference to a coachman, it is said: "He is hired by the master, either personally or by those who are intrusted by the master with the hiring of servants."³ So, "If a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So, the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff, or hind, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him. So, in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the

¹ *Freer v. Cameron*, 4 Rich. 228.

² *Moore v. Sanborne*, 2 Mich. 519.

³ Per Littledale, J., *Laughler v. Pointer*, 5 B. & C. 547.

owner is answerable for their default in doing any acts on account of their employer.”¹ And the same rule applies, although both servants are themselves masters, and one is employed by the other only for the particular service in which the injury occurs. Thus the defendants, occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. During the process of lowering, the barrel fell, and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held to be liable.²

11. But while a master is responsible for injuries arising from the negligence of his servant or those employed by such servant; it is the prevailing doctrine, that a party who has *contracted* for the doing of certain work, for his use and benefit, is not liable for injuries arising in the performance of such work. (a) The distinction is predicated upon

¹ *Laughler v. Pointer*, 5 B. & C. 554. ² *Randelson v. Murray*, 3 Nev. & Per. 239.

(a) It is to be observed, that the relation of master and servant sometimes depends rather upon the actual connection of the parties in a particular transaction, than upon any contract between them. Thus, where A. bought a heavy article of B., at his store, and sent a porter to get it, and the porter, by permission of A., using his tackle and fall, through negligence suffered the article to fall, by which C. was injured; it was held, that the porter acted as the servant of B., and that A. was not answerable. *Stevens v. Armstrong*, 2 Seld. 485.

Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to the plaintiff; the Court were divided in opinion as to the liability of the owner of the carriage. *Laughler v. Pointer*, 5 B. & C. 547.

By arrangement between the defendant, the registered proprietor, and the licensed driver of a hackney cab, the driver paid 14s. 6d. each morning for the uncontrolled use of the cab and two horses during the day, and the fares earned each day belonged to the driver. The horses were fed at the

the ground that a master *has the control* of his servant, and can remove him for misconduct;¹ while a contractor, as between him and his employer, is responsible only *for the fulfilment of his agreement*, and, pending the performance of the work, is to a certain extent substituted for the party for whom the work is to be performed. Upon the questions, however, whether in any particular case the one or the other of these two relations subsists, whether the distinction above referred to is well founded, and, if so, how far it is modified by peculiar circumstances; many and somewhat conflicting decisions are to be found in the books.

12. In an early and leading case, which, however, has been often questioned, and is now substantially overruled; the defendant, having a house by the roadside, contracted with A. to repair it for a stipulated sum; A. contracted with B. to do the work, and B. with C. to furnish the materials. The servant of C. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. Held, that the defendant was answerable.² So the defendant, a warehouseman, at Liverpool, employed a master porter to remove a barrel from his warehouse. The latter employed his own men and tackle; and, through the negligence of the men, the tackle failed, and the barrel fell, and injured the plaintiff. Held, the defendant was liable.³ So an employer is held answerable for the misfeasance of one, who, on account of *peculiar skill*, is

¹ Quarman v. Burnett, 6 M. & W. 499. But see Reedie v. The London, &c. 4 Exch. 244.

² Bush v. Steinman, 1 Bos. & Pul. 404.

³ Randleson v. Murray, 8 Ad. & Ell. 109.

expense of the defendant, and his name appeared upon a plate on the cab. Held, the driver was the servant or agent of the defendant, with authority to enter into contracts for the employment of the cab, and the defendant therefore liable for a loss occasioned by the breach of a contract by the driver safely and securely to carry. *Powles v. Hider*, 36 Eng. L. & Eq. 162.

employed by the day to oversee certain work, and who takes the entire charge of it.¹ So the defendants, contracting with pipelayers to lay down water-pipes in a city, were held liable for the negligence of workmen employed by the pipelayers.² So a municipal corporation, employing workmen to lay down gas-pipes in the borough, is responsible for their negligence.³ So a railroad corporation made a contract for the building of a certain portion of the railroad. While the contractors were at work upon the road, rocks were blasted, and a stone was thrown upon the plaintiff, causing him injury. Held, the plaintiff might maintain an action against the corporation.⁴ So the plaintiff was injured, by being thrown from his wagon by a collision with a car owned by one railroad, but drawn by horses owned by another railroad, and driven by a man employed by the latter. Held, the latter railroad was liable.⁵

13. A numerous class of cases upon this subject, are those affecting the liability of *owners of real property*, for injuries done in the performance of work upon such property. (a) Thus the defendant, the owner and occupier of premises adjoining the highway, employed A. to make a drain therefrom to the common sewer. The workmen employed by A. placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained personal injury. Before the accident, the dangerous position of the heap was pointed out to the defendant, who prom-

¹ Morgan v. Bowman, 22 Mis. 538.

⁴ Stone v. Cheshire Railroad, 19 N.

² Matthews v. West London, &c. 3 H. 427.

Camp. 403.

⁵ Weyant v. New York, &c. 3 Duer,

³ Scott v. The Mayor, &c. 37 Eng. 360.
L. & Eq. 495.

(a) Such was the leading case of *Bush v. Steinman*; and there, as in other cases, the general principle was applied, that the owner of the soil is responsible for its proper use, and liable to damages for any nuisance existing thereupon. It will be seen, however, that this has not been generally regarded as a decisive test of liability.

ised to remove it. A. had the sole management of the work, and employed and paid B. to cart away part of the rubbish at a certain price per load, and had charged the defendant in his bill with the sum so paid. Held, the defendant was liable to the plaintiff.¹ So the defendant, with the consent of the owner of the soil and the surveyor of the district, employed P., a laborer, particularly skilled in the construction of drains, but never before employed by the defendant, to cleanse a drain which ran from the defendant's garden under the public road, and paid P. five shillings for the job. The defendant did not in any way interfere with or direct P. in doing the job. Held, the defendant was liable for an injury occasioned to the plaintiff, whilst riding on the public road, by reason of the negligent manner in which P. had left the soil of the road over the drain.² (a) So, if A. contract with B., to do the carpenter work of a building at a fixed price, and to superintend the other work on the building, employing hands and certifying their bills to B., who pays them, and A. is guilty of negligence, in not sufficiently guarding a pit or vault opened in the sidewalk of the premises on which the building is erected; B. will be responsible for damage sustained by a person falling into the opening in consequence of such negligence. Had the negligence been that of the carpenters working under A., the rule of responsibility might have been different.³ So, where a person employs a mechanic to make a drain for him, on his own lands, and extending thence to a public drain, the mechanic procuring the necessary materials, hiring laborers,

¹ *Burgess v. Gray*, 1 Com. B. 578.

² *Samyn v. McClosky*, 2 Ohio, N. S.

³ *Sadler v. Henlock*, 30 Eng. L. & 536.
Eq. 167.

(a) Where the purchaser of land permits a third person, in possession at the time of the purchase, to retain exclusive possession, no rent being paid or claimed, the purchaser will not be liable for his building a dam upon the land, without the knowledge of the purchaser, whereby injury is occasioned to the premises of an adjacent landowner. 20 Verm. 302.

and charging a compensation for his services and disbursements, the mechanic is deemed to be in the service of his employer, to the effect of rendering his employer responsible to a third person, who sustains damage by reason of want of skill or want of due diligence and care on the part of the mechanic.¹ So A. left his cart, filled with wood, by the side of the fence, within the highway, before his homestead, in the evening; and the next morning the cart was found in the travelled path, about five rods distant from the place where it was left, upset, lying on one side, and the wood by it, constituting together a dangerous obstruction in the road. By whom or by what agency this was done, did not appear; but A., knowing the situation of his property, and having a reasonable opportunity to remove it, suffered it to remain there two or three days, when B., travelling along the highway in the night, in a one-horse wagon, drove accidentally upon the cart and wood, without previously discovering them, by reason of which he was violently thrown from his wagon, and severely and dangerously injured. In an action on the case, brought by B. against A., to recover damages for this injury, it was held, 1st, that the property in question, notwithstanding its removal, continued to be legally in the possession and under the control of A.; 2d, that A., having knowingly and willingly permitted his property to remain where it was so placed, was liable to B. for the injury he sustained thereby; 3d, that, if the obstruction was effected by a trespasser who was unknown to A., this circumstance would not change or modify A.'s duties and responsibilities in the case.² So A. hired B. to move a house across a street to a lot of A.'s. B., in moving the house, dug a hole near the middle of the street, for fixing an anchor, by which the house could be turned. C.'s horse fell into the hole, which B. had neglected to fill up; and was injured. Held, that A. was liable for the injury.³ So, in an

¹ *Stone v. Codman*, 15 Pick. 297.

³ *Wiswall v. Brinson*, 10 Ired. 554.

² *Linsley v. Bushnell*, 15 Conn. 225.

action on the case for an injury to real estate, caused by the undermining of a hill on the defendant's premises, by which a *slide* occurred, covering the plaintiff's land; it is not necessary for the plaintiff to show actual negligence on the part of the defendant himself. It is enough to show that the defendant permitted another person to remove the earth from his premises, and that this was done in a negligent manner.¹

14. But, on the other hand it is held, that while "every man is answerable for acts done by the negligence of those whom the law denominates *his* servants; because such servants represent the master himself, and their acts stand upon the same footing as his own:"² "the *sub-contractor*, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants, in the execution of the work contracted for."³ It is said: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care, of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."⁴ Thus it is often held, that *municipal corporations* are not liable for the acts or negligence of their contractors, unless the relation of master and servant exists between them.⁵ (See p. 551.) So trustees or commissioners, intrusted with the conduct of public works, are not liable for injuries occasioned by the negligence of the workmen em-

¹ Gardner v. Heartt, 2 Barb. 165.

² Per Littledale, J., Laughner v. Poin-
ter, 5 B. & C. 547.

³ Per Maule, J., Overton v. Free-

man, 11 Com. B. 867. See Allen v.
Hayward, 7 Ad. & Ell N. S. 960.

⁴ Per Rolfe, B., 4 Exch. 255.

⁵ Barry v. St. Louis, 17 Mis. 121.

ployed under their authority.¹ As where the corporation of the city of New York, having ordered a street to be graded, contracted with A. to do the grading, the whole work to be done under the direction and to the entire satisfaction of the commissioner, &c. And it was held, that the city was not liable for damages caused by the workmen employed by A.² So A. contracted with B. to erect a tubular bridge. B. had a surveyor, C., whom he paid a salary of £250 a year to attend to his general business; and, after obtaining the contract for the bridge, contracted with C. to provide the necessary scaffolding, for which he was to receive £40 irrespective of his salary, B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and, owing to the want of sufficient light to warn the passers-by, D. stumbled over the pole and was injured; subsequent to which, additional lights were placed on the spot, and B. paid for them. Held, that B. was not liable, and that D.'s remedy was against C.³ So, if the owner of goods, in shipping them, has no control over the process, which is entirely in the hands of the master of the vessel; an action for an injury, sustained by one employed by the owner to assist in shipping his goods, by reason of a defect in the tackle, unknown to the injured man, and which by the use of ordinary care might have been cured, should be brought against the master alone; though it would be otherwise when the duty lies wholly upon the owner, or is jointly divided between him and the master.⁴ So the defendant, a builder, employed by the committee of a club to make certain alterations at the club-house, employed A., a gasfitter, by sub-contract, to do that part of the work. By the negligence of A., in the course of the work, the gas exploded, and injured the plaintiff. Held, the defendant was not liable.⁵ So the defendants were permitted to construct a

¹ *Harris v. Baker*, 4 M. & S. 27; *Hall v. Smith*, 2 Bing. 156.

² *Kelly v. New York*, 1 Kern. 432.

³ *Knight v. Fox*, 1 Eng. L. & Eq. 477.

⁴ *McGatrick v. Wason*, 4 Ohio, 566.

⁵ *Rapson v. Cubitt*, 9 M. & W. 710.

public sewer at their own expense, and employed one A. to do the whole work at a stipulated price. The plaintiffs received an injury from the negligent manner in which the sewer was left at night. Held, the defendants were not liable.¹ So a public, licensed drayman was employed by the defendant to haul salt from a warehouse, and deliver it at the defendant's store, for so much a barrel. While in the act of delivering it, a barrel, through the drayman's carelessness, rolled against and injured the plaintiff, being on the side-walk. Held, the defendant was not liable.² So, upon a declaration, that the defendant was licensed to run a skiff ferry across a river, and did run it by his lessee; and that the plaintiff's intestate was taken on board, and by the negligence and want of skill of the rower was drowned; held, whether the rower was the lessee or one in his employ, and though the lease was a breach of the defendant's duty to the government; he was not liable.³ So A. contracted with parish officers to pave a certain district, and entered into a sub-contract with B., under which the latter was to lay down the paving of a street, the materials being supplied by A., and brought to the spot in his carts. Preparatory to the paving, the stones were laid, by laborers employed by B., on the pathway, and there left unguarded at night, in such a manner as to obstruct the same, and C. fell over them, and broke his leg. Held, that B. was responsible for this negligence, and not A.⁴ And although the tendency of former decisions has been to establish a distinction, by which the owner of *real estate* is in all cases held liable for injuries done in the prosecution of work thereupon; a doubt has been suggested, whether this distinction can be relied on.⁵ And in a late case the distinction has been said not to exist, except in case of nuisance.⁶ And it is now the prevailing doctrine, that the general owner

¹ *Blake v. Ferris*, 1 Seld. 48.

² *DeForrest v. Wright*, 2 Mich. 368.

³ *Blackwell v. Wiswall*, 24 Barb. 355.

⁴ *Overton v. Freeman*, 11 Com. B. 244.

⁵ Per *Ld. Denman*, *Milligan v. Wedge*, 12 Ad. & Ell. 737.

⁶ Per *Ld. Chan. Cranworth*, 4 Exch.

of real estate is not answerable for acts of carelessness, negligence, and mismanagement, committed upon or near his premises, to the injury of others, if the conduct of the business which causes the injury is not on his account, nor at his expense, nor under his orders or efficient control.¹ Thus the owner of land, who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair.² So where A. agreed to convey land to B., and B. agreed to build a house thereon and pay for the land, and, while the agreement was in force, B., in preparing to build the house, on his own sole account, by workmen employed by himself alone, undermined the wall of the adjoining house of C., whereby it was injured; it was held that A. was not answerable for this injury, although the title to the land remained in him at the time when the injury was committed.³ So the owner of land is not answerable to his adjoining neighbor, for damages resulting from the act of contractors, who had the entire control of the premises to erect a building, provided the act causing the damage was not specified to be done by the contract.⁴ And, on the other hand, where A. contracted with B. and C. to build her a house, to be finished complete; and B. and C. employed D., a blacksmith, to make and place a grating in the area; and the hole over which the grating was to be placed was left uncovered, and E. fell into it, and broke his leg; held, B. and C., the first contractors, were liable to E.⁵

15. The question, indirectly involved in almost all the cases upon this subject, and more especially in those relating to real estate, has also been more distinctly raised,

¹ *Earle v. Hall*, 2 Met. 353.

² *Hilliard v. Richardson*, 3 Gray, 349.

³ 2 Met. 353.

⁴ *Gilbert v. Beach*, 4 Duer, 423.

⁵ *McCleary v. Kent*, 3 Duer, 27.

whether the general exemption from liability for the negligence of a contractor is applicable to contracts, either by their terms involving, or in their execution causing, what the law technically considers a *nuisance*. Upon this subject it is said: "It is not necessary to decide whether, in any case, the owner of real property may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants."¹ And upon the same principle it is held, that, where a person is employed to do an unlawful act, by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, and the act that of his servants. Thus the defendants, a registered joint-stock company, contracted with W. for the laying of their main gas-pipes, in the streets of Sheffield, having no special powers for that purpose. The servants of W. left a heap of earth and stones, which had been thrown out of the trenches dug for receiving the pipes in one of the streets, and the plaintiff, in passing along the street, tumbled over it and was injured. Held, the defendants were liable.² So the defendant had caused certain vaults to be constructed in front of his house, and within the line of the street, by a contract which provided for the proper flagging of the sidewalk above the vaults. More than a year after the completion of the work, the plaintiff was precipitated into the area, by the giving way beneath him of a flag-stone, which formed

¹ *Reedie v. The London, &c.* 4 Exch. 244.

² *Ellis v. Sheffield, &c.* 22 Eng. L. & Eq. 198; 2 Ell. & Bl. 766; 5 Duer, 495.

part of the covering of the vaults. The testimony as to the manner in which the work had been executed was conflicting. Held, the defendant was liable.¹ But where A. contracted to pave a district, and B. contracted with him to pave a particular street, A. supplying the stones, his carts being used to carry them; and, in the course of the work, B.'s men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff; held, that A. was not liable, although the act amounted to a public nuisance.² So the defendants contracted with A., to fill in the earth over a drain which was being made for them across a portion of the highway, from their house to the common sewer. A., after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained personal injury. A few days previous to the accident, and before the work was completed, one of the defendants had seen the earth so heaped over a portion of the drain, but, beyond this, there was no evidence, that either defendant had interfered with, or exercised any control over the work. Held, there was no evidence to go to the jury of the defendant's liability.³ (a)

¹ *Congreve v. Morgan*, 5 Duer, 495.

² *Peachey v. Rowland*, 16 Eng. L. &

³ *Overton v. Freeman*, 8 Eng. L. & Eq. 442.
Eq. 479.

(a) In the case of *Hilliard v. Richardson*, 3 Gray, 849, Mr. Justice Thomas gives the following comprehensive view of late cases in Massachusetts upon this important subject: "Stone v. Codman (15 Pick. 297) was this. The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials and hired the laborers, charging a compensation for his services and disbursements. 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in the use of it for the defendant's benefit. 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job. 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed."

16. The liability of a master for his servant has often arisen in connection with *public officers*. It is held, that the

In the case of *Lowell v. Boston and Lowell Railroad*, 23 Pick. 24, the action was to recover of the railroad the damages which the town had been compelled to pay in consequence of a defect in the highway caused by the construction of the railroad. "The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defence was not sustained; nor should it have been.—It is the corporation that are intrusted by the legislature with the execution of these public works, and they are bound, in the construction of them, to protect the public against danger.—They cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders."

In the case of *Earle v. Hall*, 2 Met. 353, "the general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another; but who has the efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury."

The learned Judge proceeds to examine the cases, upon which the leading decision of *Bush v. Steinman* purports to rest.—"*Stone v. Cartwright* (6 T. R. 411,) lays no foundation for the rule in *Bush v. Steinman*. The decision was—that no action would lie against a steward, manager, or agent, for the damage of those employed by him in the service of his principal.

"The case of *Littledale v. Lonsdale*, (2 H. Bl. 267,) in its main facts, cannot be distinguished from *Stone v. Cartwright*. The defendant's steward employed the workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants."

Rosewell v. Prior (2 Salk. 460,) merely decided that an action for continuing to obstruct lights might be brought against the party who erected the obstruction, though a previous suit had been brought for the original erection, and though the defendant had leased his premises.

In *Michael v. Alestree*, (2 Lev. 172,) it was held that an action would lie against a master for damage done by his servant in exercising his horses in an improper place.

head of a public office under government, with power to appoint and remove the servants of the office, who are to be paid by, and give, at his discretion, security to government, is not responsible to an individual, for a loss occasioned by the default of such servant. The servant guilty of the default is responsible. Thus, in England, the postmaster general is held not answerable for a packet delivered to the receiver at the post-office, and lost out of the office. But the receiver is liable.¹ Nor for the value of a bank-note, stolen by one of the post-office employees out of a letter delivered into the office.² And more especially is this principle applied to a person acting gratuitously for the public. Such party is not liable for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention; nor for the negligent execution of an order properly given to others. Thus clerks to commissioners, appointed under a lighting and paving act, and entrusted with the conduct of public works, are not liable in damages for an injury occasioned

¹ *Lane v. Cotton*, 1 Ld. Raym. 646.

² *Whitfield v. LeDespencer*, 2 Cowp. 754.

"The examination of these cases justifies the remark that *Bush v. Steinman* does not stand well upon the authorities.—The rule it adopts is apparently for the first time announced."—All the opinions given in it lose sight of these two important distinctions: In the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents, under the efficient control of the defendants, or were nuisances created upon the premises of the defendants, to the direct injury of the estate of the plaintiffs."

The learned Judge proceeds to examine the cases subsequent to *Bush v. Steinman*, and comes to the conclusion that that case "is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been."—The case at bar "can only stand, where *Bush v. Steinman*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do—to adopt which would be to ignore all limitations of legal responsibility."

by the negligence of those persons whom they employ to conduct the works.¹ So the plaintiff's vessel received damage, through the negligence and unskilfulness of the master of a steam-tug, which was employed in towing it in the harbor of N. By an act of Parliament, which appointed commissioners of the harbor, it had been provided, that it should be lawful for the commissioners to build or provide steam-tugs for towing vessels into or out of the harbor, and that any person requiring the assistance of a towing-vessel should pay to the commissioners such reasonable compensation as the commissioners should fix. An arrangement had been entered into between the commissioners and the proprietors of the steam-tugs, which had previously plied in the harbor, without being subject to any control of the commissioners; that the proprietors should employ their boats at a reduced scale of charges, and that the commissioners should pay them an annual compensation for the reduction. The steam-tugs had been, by consent of the proprietors, placed under the control of the harbor-master, who was authorized by the act to give directions respecting the management of vessels in the harbor. Held, the plaintiff could not maintain an action against the commissioners.² On the other hand, one employed by a public officer is himself held liable for the consequences of his own negligence. Thus an action on the case lies against paviors, employed by the commissioners appointed by Parliament for paving the streets, for raising the pavement in front of the plaintiff's houses, by which the passage and lights to the houses are obstructed.³ And similar questions of liability have arisen, where the position of parties is reversed, and it is sought to charge a party, for a loss arising from the fault or neglect of a public officer whom he has employed. In reference to a case of this nature it is said, that, where an employee is exercising a distinct and

¹ *Hall v. Smith*; *Billington v. Same*,
⁹ Moo. 226; 2 Bing. 156.

² *Cuthbertson v. Parsons*, 11 Eng. L.
& Eq. 521.

³ *Leader v. Moxton*, 3 Wils. 461; acc.
1 *Ld. Raym.* 646.

independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee. Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much per barrel, and, while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk; it was held, that the employer was not liable for the injury.¹ And the same rule is more especially applied, where the loss is owing to a servant of the public officer himself. Thus the buyer of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others, the property of different persons,) to the owner's slaughter-house. Mischief was occasioned by the bullock, through the careless driving of the boy. Held, that the owner was not liable for the injury; the boy not being, in point of law, his servant; although the careless driving and accident took place after the boy had driven the bullock beyond the bounds of the city, towards the defendant's house. And it was said that the owner would not have been liable, if the drover himself had been driving at the time of the injury.²

17. Similar questions have arisen—see p. 542, and chap. 25—in relation to *corporations* and the officers thereof, or parties claiming under them. Thus it is held, that the corporation of the city of New York, which had ordered a street to be graded, and had contracted with a person to do the grading, is not liable for damages caused by the negligence of the workmen employed by the contractor; although the contract provides that the work shall be done under the direction and to the satisfaction of certain officers of the corporation.³ So where a

¹ De Forrest v. Wright, 2 Mich. 368.

² Kelly v. Mayor, &c. 1 Kern. 432.

³ Milligan v. Wedge, 12 Ad. & Ell. 737; 4 Per. & Dav. 714.

license or grant to construct a sewer was given by the city authorities, with the provision that the grantees should cause "proper guards and lights to be placed at the excavation, and should be answerable for any damages which might be occasioned to persons, animals, or property in the construction of the sewer;" it was held that this provision did not enure to the benefit of a stranger, so as to render the grantees liable to such stranger for the negligence of servants or agents, for whose conduct they would not otherwise be responsible.¹ But the corporation of the city of New York is held liable for injuries to third persons, resulting from the negligence of persons employed by officers of the corporation, in the repair of the public sewers.² So, where the mayor and aldermen of Memphis procured a cistern to be dug, which occupied a portion of a sidewalk of the city; and, it being negligently left open, the plaintiff fell into it and was disabled; held, the mayor and aldermen had the right to cause the cistern to be dug, but were responsible for damages occasioned by the negligence of the agents or servants employed by them for that purpose.³

18. A principal is responsible for the *fraud* of his agent, if committed while transacting the business of the former; and whether he be sole agent, or one of several, possessing joint authority.⁴ Thus a principal is chargeable with the fraudulent acts and declarations of a special agent, done and made for the purpose of effecting a sale, though not commissioned to commit a fraud. And, even where a party could not recover damages against a principal on account of the fraudulent representations of his special agent, he may avail himself of those representations by way of defence to an action on the contract by the principal.⁵ And though the principal was not aware, at the time, that the representa-

¹ *Blake v. Ferris*, 1 Seld. 48.

⁴ *Bank of U. S. v. Davis*, 2 Hill,

² *Lloyd v. The Mayor, &c.* 1 Seld. 451.
369.

⁵ *Concord Bank v. Gregg*, 14 N. H.

³ *Mayor, &c. v. Lassar*, 9 Humph. 331.
757.

tions of his agent were false, he is nevertheless liable, on the principle that, of two innocent parties, the one shall suffer whose agent causes injury to the other.¹ (a) So he is liable, although the agent had no knowledge that the representation was false, and though the principal did not instruct him to make it, if the principal had knowledge as to the fact misrepresented. Thus the defendant, being owner of a house, employed an agent to sell it. The agent described it as free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the defendant knew. On the faith of the agent's description, the plaintiff bought the house. Held, that the plaintiff might maintain case for deceit against the defendant; though it did not appear that the defendant had instructed the agent to make any representation as to rates or taxes.²

19. But, although a master is civilly responsible for the fraud as well as negligence of his servant, acting in the course of his employment; the general rule applies alike to both descriptions of wrong, that the master is not responsible for acts done by the servant out of the scope of his authority, or inconsistent with the course of his employment. Therefore, where A., the servant of a wharfinger, untruly

¹ *Hunter v. Hudson*, &c. 20 Barb. 493.

² *Fuller v. Wilson*, 3 Ad. & Ell. N. S. 58.

(a) More especially, where a principal, knowing a material objection to his property, employs an agent, who is ignorant of such objection, to sell or let the property, and the latter unconsciously makes a false representation to the purchaser, thereby inducing a contract; the former will be bound by such misrepresentation. *National, &c. v. Drew*, 32 Eng. L. & Eq. 1.

So, where a bill of exchange was sent to one of the directors of a bank, to be discounted for the benefit of the drawer, and the former, who was at the same time a member of the board which ordered the discount to be made, received the avails, alleging the discount to be for his own benefit; held, that the bank was chargeable with knowledge of the fraud, and therefore could not recover upon the bill. *Bank, &c. v. Davis*, 2 Hill, 451. See *Nelson v. Cowing*, 6 Hill, 336; *Gibson v. Holt*, 7 Johns. 390; *Sandford v. Handy*, 23 Wend. 260.

and fraudulently signed a receipt, purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C., and thereby wilfully induced C. to pay the price to the pretended vendor; it was held, that the wharfinger was not liable, although C.'s course of dealing was, to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt; and the latter knew it.¹

20. While a master is in general responsible for the wrongs of his servant; the question arises, whether this is an exclusive liability, or whether the servant is not also responsible. It has been sometimes held, that trover cannot be maintained against a servant who has acted by his master's command, unless it were to do an apparent wrong. Where the master's case depends *on a title*, as where the command is given under the color of a right, whether valid or not, the servant will be excused. For it would be unreasonable to require the servant to scrutinize the master's title, and thus to make him in all cases act at his peril.² (a) And, upon this subject, it is said, by an approved writer: "It has been supposed, that trover cannot be supported against a servant, for an unlawful intermeddling with the goods of another, by the command of his master, unless such intermeddling amount to a trespass; but this doctrine appears to have been overruled, and trover may be supported against a servant or agent, or any other person, who intermeddles with, or unlawfully converts goods to the use of another. And it is clear that a servant cannot plead the command of his master or princi-

¹ *Coleman v. Riches*, 16 Com. B. 104; 29 Eng. L. & Eq. 323; acc. *Grant v. Norway*, 10 Com. B. 665; *Hubberstly v. Ward*, 8 Exch. 330; *Wilson v. Ful-* *ler*, 3 Ad. & Ell. N. S. 68; 3 Gale & Dav. 570.
² *Mires v. Solebay*, 2 Mod. 242; *Berry v. Vantries*, 12 S. & R. 92.

(a) A *military officer*, acting under the law martial, is justified by an order from a superior officer, apparently within the scope of his authority. If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable. *Despan v. Olney*, 1 Curt. 306.

pal, to what in point of law is a trespass. However, for deceit on the sale of goods, as for a false warranty, in general, when the agent acted in pursuance of the direction of his principal, the action must be against the latter. A servant or deputy cannot in general be sued for a mere nonfeasance; but for misfeasance or malfeasance, an action may in some cases be supported against a servant or deputy. And no action is sustainable against an intermediate agent or steward, for damage occasioned by the negligence of a sub-agent, but the action must be against the principal, or the person who actually committed the injury."¹ As thus suggested, in reference to *intermediate* agents or servants, it is held, that no action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal, or those actually employed, only, are liable.² Thus, in an action to recover for an injury sustained by reason of alleged negligence in blasting rocks, it appeared that one A. contracted to do the stone-work and masonry on a railroad, and, with his men, commenced quarrying stone from a certain ledge. He afterwards employed the defendant, as his general agent, to superintend all the work upon his contract; and, as such agent, the defendant gave to one B., the special agent of A., who had charge of the blasting on the ledge, general directions respecting the work upon the ledge. B. gave the directions relative to the particular blast, by which the injury complained of in this action was incurred; and the defendant, at the time of the blast and previously, was in another part of the ledge, paying no attention to the preparation of the blast. Held, the action should have been brought against A. or B., and that it could not be sustained against the defendant.³ And the general doctrine above referred to has been often applied, that a servant or deputy is not chargeable as such for *neglect*, but only for *misfeasance*; but recourse must

¹ 1 Chit. Pl. 74, 75.

² Brown v. Lent, 20 Verm. 529.

³ Stone v. Cartwright, 6 T. R. 411.
See Grylls v. Davies, 2 B. & Ad. 514.

be had to the principal;¹ that where an agent neglects to perform a duty which he owes to his principal, and third persons are thereby injured, their remedy is against the principal, and not against the agent.² Thus, where the plaintiff was the assignee of a certificate of stock, standing in the name of another person, in a foreign banking corporation, which had a transfer office in New York, under the charge of the defendant, an agent authorized to register transfers, who unjustly refused to permit A.'s stock, which was registered in that office, to be transferred to him on its books; it was held, that an action could not be maintained.³ But the prevailing doctrine is, that the command of a superior, to commit a *trespass* or other *unlawful act*, is no justification to an inferior;⁴ (a) that the servant is only to obey his master in matters that are honest and lawful;⁵ that, if one person commit an unlawful act or misfeasance under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party.⁶ Thus an agent, who negligently directs water to be admitted to the water pipe in a room of a house owned by his principal, but of which he has the general management, is guilty of misfeasance, and is liable to the tenant of the shop below for the damages resulting from such admission. And the fact, that the room, in which the pipe is, is leased to another tenant at the time, is not conclusive against his liability.⁷ So A., having entered the close of the plaintiff, and cut a quantity of cord wood, sells it to B., who hires the defendant, the master of a coasting vessel, to go in company with C., and transport the wood to market. Held, the defendant was

¹ Lane v. Cotton, 12 Mod. 488.

² Denny v. Manhattan Co. 2 Denio, 115.

³ Ibid.

⁴ Brown v. Howard, 14 Johns. 119;

Perkins v. Smith, Sayer, 40; Mires v. Solebay, 2 Mod. 244.

⁵ 1 Bl. Comm. 430.

⁶ Johnson v. Barber, 5 Gilm. 425;

Richardson v. Kimball, 28 Maine, 463.

⁷ Bell v. Josselyn, 3 Gray, 309.

(a) A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser. 3 Stark. Ev. 1445, n. y.

liable for the value of the wood in an action of trespass *qu. claus.* brought by the plaintiff, although he was ignorant of the original trespass committed by A.¹ And the rule more especially applies, where the agency is not disclosed. Thus one who exchanges counterfeit money for an agent, supposing him to be the principal, may proceed against either, upon learning the fact of the agency.² (a) But it is also held, that an agent, though professedly acting as such, is individually responsible to the purchaser for a fraud committed by him in the sale of property.³ So, when money is paid to an agent by fraud or duress, or when his principal has no legal right to it, or when it is paid to him by mistake; it may be recovered from the agent, so long as it has not been paid over to his principal, nor his situation altered, relatively to his principal, as touching that fund. So, if notice be given, the agent will be liable, even if he does pay it over, or his situation is afterwards altered.⁴ And an auctioneer, who receives and sells stolen property innocently, and in the ordinary course of his business, is liable to the owner for a conversion, though he has paid over the money to the felon before he knew of the theft, and though the thief be not prosecuted to conviction.⁵

21. Notwithstanding some contrary authorities, (see p. 554,) the general rule upon this subject is applied to trover as well as other actions for tort; that it is no defence, that the defendant acted under the employment of another, who was himself a trespasser.⁶ Thus, where a cartman, at the request of another person, takes goods and carries them away on his cart, under circumstances sufficient to put him

¹ *Higginson v. York*, 5 Mass. 341.

² *Fishback v. Brown*, 16 Ill. 74.

³ *Campbell v. Hillman*, 15 B. Mon.
508.

⁴ *McDonald v. Napier*, 14 Geo. 89.

⁵ *Rogers v. Huie*, 1 Cal. 429.

⁶ *Gaines v. Briggs*, 4 Eng. 46.

(a) Where an agent has incurred personal liability by not communicating the name of his principal, he is not discharged from such liability by the fact, that the principal agreed with A. to submit the matter in dispute to arbitration. *Nason v. Cockroft*, 3 Duer, 366.

on his guard as to the legality of the taking; he is equally liable with the employer to an action of trover for the goods, at the suit of the owner.¹ And a servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.² Or though he disposes of the goods to his master's use, whether he has any authority or not for so doing from the master.³ And one who, as agent, intermeddles with the goods of another, is guilty of a conversion, if the act would have been such if done by his principal, although he was ignorant of the owner's title; and may be sued in trover, although he has parted with the possession to his principal.⁴ (a) But the refusal of a servant to deliver goods intrusted to him by his master, on a demand made by a stranger, is held not sufficient evidence of a conversion, in an action by the latter against the servant.⁵ (b)

¹ *Thorp v. Bourling*, 11 Johns. 285.

⁴ *Lee v. Mathews*, 10 Ala. 682; *Parmenter v. Kelly*, 18 Ala. 716.

² *Stephens v. Elwall*, 4 M. & S. 259.

³ *Perkins v. Smith*, 1 Wils. 328; ⁵ *Mount v. Derick*, 5 Hill, 455.

Sayer, 40.

(a) A. having lawfully received certain bills from B., a trader, C. came to him, and, stating that he was acting on behalf of Messrs. Y. & Co., creditors of B., demanded the bills from A., and, upon his refusal, said that B. was about to be made a bankrupt, that the bills must be given up, and that, if they were not, A. would be compelled to give them up by the commissioner, and the expense would cost A. £200, and the commissioner would be very angry. A. was at the time ill in bed, and, being greatly alarmed, gave up the bills. Held, that this was no conversion by C., as trespass would not have been maintainable. But, it appearing that afterwards, and before C. had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but, notwithstanding, he delivered them to Y. & Co.; held, this was a conversion. *Powell v. Hoyland*, 2 Eng. L. & Eq. 362.

(b) Nor will such demand and refusal be sufficient evidence of a conversion to charge the master, unless the servant refused, under directions from the master. *Mount v. Derick*, 5 Hill, 455.

Though, on demand made of the servant, he refuse to deliver, because he has no authority, and his conduct be afterwards approved by the master for that reason, the approval will not render the latter chargeable with a conversion. *Ibid.*

22. With regard to the liability of the servant to the master, (a) it is somewhat difficult to deduce, from the authorities, any general rule, other than those which pertain to the general relation of *bailment*, (b) and which may be considered to include the relation of master and servant, more especially whenever property is intrusted to the latter. In general, a servant is not liable to the master without proof of positive neglect or wrong. Thus, it is held, that, if the servant of a common carrier accidentally lose goods intrusted to his master to carry, the master cannot maintain an action against him for the value, unless he can prove negligence, and has paid the money to the owners.¹ So the plaintiff intrusted the defendant with goods to sell in India, agreeing to take back what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. The defendant, not being able to sell the goods in India himself, left them with an agent to be disposed of

¹ *Savage v. Walthew*, 11 Mod. 135.

It has been held that a servant may sometimes justify a positive act of force by the command of the master. Thus the bringing of his fellow-servant *vi et armis* from a conventicle or an alehouse. 2 Mod. 167.

So also in defence of his master. But this justification will be strictly limited to such defence. Thus, in trespass for assault and battery against A. and B., A. pleaded *son assault*, and B. pleaded, that he was servant to A., and that, the plaintiff having assaulted his master in his presence, he, in defence of his master, struck the plaintiff. Held, on demurrer, the plea was ill; for the assault on the master might be over; and the servant cannot strike by way of revenge, but in order to prevent an injury; and he should have pleaded, that the plaintiff would have beaten the master, if the servant had not interposed, *prout ei bene licuit*. The plaintiff had judgment. *Barfoot v. Reynolds*, 2 Stra. 953.

(a) In general, *sub-agents*, acting *ex contractu*, are responsible only to the immediate agents who employ them, and not to the principals of such agents. And it is held, that the case of public officers is not necessarily an exception to this rule, although, under particular circumstances, an exception may arise. *Trafton v. United States*, 3 Story, 646.

(b) See *Bailment*.

by him, directing the agent to remit the money to himself in England. Held, trover did not lie.¹ So a banker in London, receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment, is not guilty of negligence, in giving up such bills to the acceptor, upon receiving a check upon a banker for the amount, although it turn out that such check is dishonored.² And the master can enforce the liability of the servant only in the precise form adapted to the circumstances of the case. Thus an action against a factor "for not selling for the best price," is not supported by evidence of a reduced price by reason of a delay in selling.³ So it seems, that, where an agent is authorized to deliver goods to a third person, on receiving sufficient security for the amount, and delivers them without sufficient security; trover will not lie against him, but the proper remedy is an action on the case.⁴ So if a broker, authorized to sell goods for a certain price, sells them for a less price, the remedy is an action on the case.⁵ (a) But, on the other hand, it is held, that, when a party accepts and enters upon even a *gratuitous* agency, he is bound to use such diligence as a prudent man uses in reference to his own affairs.⁶ And an agent for hire, without specific instructions, is bound to observe all the precautions ordinarily pursued in relation to the particular business in

¹ Bromley v. Coxwell, 2 B. & P. 438.

⁵ Dufresne v. Hutchinson, 3 Taunt.

² Russell v. Hankey, 6 T. R. 12. 117.

³ Merle v. Hascall, 10 Mis. 406.

⁶ Anthony v. Smith, 9 Humph. 508.

⁴ Cairnes v. Bleecker, 12 Johns. 300.

(a) While, as has been seen, a party is not liable for the acts of one with whom he has merely *contracted*, as for those of a servant; on the other hand, the liability of the latter to the former will be limited by the terms of his contract. Thus A., by a contract with a municipal corporation, undertook to construct a sewer in a public street. While in process of construction, he omitted to keep lights and to maintain guards and barriers, and B., while passing along the street, fell into the pit, was injured, and recovered therefor a large sum from the corporation. Held, as the contract did not bind the contractor to keep lights, &c., he was not liable to the corporation. *Buffalo v. Holloway*, 3 Seld. 493.

which he is employed, and according to the usage of the place, and the circumstances of the times within which the business is transacted.¹ And if a factor disobeys the orders of his principal, and a loss accrues, he is answerable to the extent of that loss.² If an agent, whose authority is limited by instructions from his principal, exceeds his commission, he is liable to him for the consequences of his unauthorized acts; and it is no excuse, that his intention was to benefit his principal.³ So it is held to be an agent's imperative duty, to give his principal timely notice of every fact or circumstance, which may make it necessary for him to take measures for his security. Thus an agent for the investment and transmission of money is liable for every default of his sub-agent which occurs, during which, by his omission, his principal was left in ignorance of the destination of a draft purchased by him on account of his principal.⁴ Though, where a gratuitous agent collects money for his principal, he is liable for its loss only in case of gross negligence on his part. If he attempts to transmit the money without instructions, and it be lost *in transitu*, he is liable, unless the principal ratifies the act. A ratification may be implied or expressed, but there can be no ratification binding on the principal, unless made with a full knowledge of all the material circumstances of the case. When the agent makes the remittance without authority, and informs the principal of it, the dissent of the principal must be expressed in a reasonable time. When no mode of remittance is prescribed by the principal, the law prescribes a mode, and that is, the mode which a man of ordinary prudence, skill, and diligence would adopt in view of the current and usage of trade, at the locality for transmitting his own money.⁵ So, in an action on the case for a *deceit*, the plaintiff declared, that he had employed the defendant to obtain a lease for him;

¹ Wright v. Central, &c. Co. 16 Geo. 38.

² Day v. Crawford, 13 Geo. 598.

³ Hardeman v. Ford, 12 Geo. 205.

⁴ Clark v. The Bank of Wheeling 17 Penn. 322.

⁵ Lyon v. Tams, 6 Eng. 189.

that the defendant fraudulently represented, that a premium of £150 was to be paid for it, whereas only £100 were to be paid; by means of which fraudulent representation the defendant obtained from him the sum of £50 and converted it to his own use. Held, that these allegations were sufficient, without further stating, that the £50, so obtained, were over and above the £100 to be paid for the lease.¹ So the plaintiff employed the defendants to sell houses by auction, and to prepare a description of them; and they described two of the houses as containing three stories, whereas they contained only two. The purchaser having compelled the plaintiff, under one of the conditions of sale, to make him compensation for the misdescription; held, the plaintiff might recover the sum thus refunded.² So the defendant, being employed by the plaintiff to sell furniture for ready money only, sold it, but took in payment a bill of exchange drawn by the purchaser on a third person. The plaintiff refused to take the bill, and applied for the proceeds of the sale, but his agent afterwards obtained the bill from the defendant to get it discounted. It was never presented for payment; the drawer never had notice of its dishonor, and was thereby discharged; and ten days elapsed after it became due, before the defendant had such notice. Held, that the defendant was liable for selling otherwise than for ready money, though it seems the defendant might sustain a cross-action for any damage sustained by him, in consequence of the plaintiff's preventing him by his neglect from recovering on the bill.³

23. The liability of an agent or servant may sometimes be enforced, by way of defence against a claim upon the master for the price of his services. (a) Upon this subject,

¹ *Pewtress v. Austin*, 2 Marsh. 217.

² *Ferrers v. Robins*, 5 Tyr. 705.

³ *Parker v. Farebrother*, 24 Eng. L. & Eq. 237.

(a) In an action for services in the making of a contract which is illegal and void by statute, and also for money paid on account of the principal, in

it is held, that a principal is liable to his factor, for all commissions, expenses, and disbursements, and advancements made and accruing in the course of the agency on his account and for his benefit, *the agent exercising reasonable skill and diligence, and acting in good faith.*¹ But an agent who is unfaithful to his trust, abuses the confidence reposed in him, and misconducts himself in the business of the agency, can recover no commissions or compensation.² And in a suit by the agent against his principal, for his expenses and disbursements, the defendant may show, in bar of the claim, the want of diligence or neglect on the part of the agent.³ So, where a factor pledges goods, which are intrusted to him for sale on commission, for advances made to himself, and authorizes the pledgee to sell to reimburse himself, he is guilty of conversion; and it seems that the principal, in the settlement of accounts between him and his factor, would be entitled to an adjustment of any claim he might have, for loss or damage resulting from such unlawful pledge.⁴ But, in an action of assumpsit, brought by the principal against the agent for money in his hands, arising from the sale of goods consigned to him, if the defendant sets up in reduction of the plaintiff's demand an account for expenses incurred by him in fitting the goods for sale in market, the plaintiff cannot set up in rejoinder the negligence of the agent. He must bring his action for damages.⁵

24. With regard to *the liability of a master to his servant*, for an injury done to him in the course of his employment for the former, the general doctrine is laid down, that, in ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself or to the service in which he

¹ Brown v. Clayton, 12 Geo. 564.

² Sea v. Carpenter, 16 Ohio, 412.

³ 12 Geo. 564.

⁴ Kelly v. Smith, 1 Blatch. 290.

⁵ 11 Geo. 564.

the execution thereof, the principal may defend, on the ground of the illegality. Stebbins v. Leowolf, 3 Cush. 137.

engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable precisely as a third person, if the loss or injury is caused by his neglect or want of care. So, if one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if known to him; and, if he fails to make this disclosure, and the workman while engaged in the service thereby sustains an injury, the employer is responsible in damages.¹ Thus A., a miner, employed to work in the mine of the defendant, went down as usual to his day's work, but he and the other miners, after working a short time, held a meeting amongst themselves, to discuss certain supposed grievances, and they resolved, before working further, to come up from the pit at twelve o'clock, the usual hour for their coming up being five o'clock, and go in a body to represent their grievances to the defendant's manager. While so coming up, A. was killed by a stone which fell from the top of the shaft, the planking there being in an unsafe state. A.'s representatives brought an action for damages against the defendant; and the Judge told the jury, that the defendant was not responsible for the accident, if A. was at the time leaving his work without proper cause, and for a purpose of his own. The jury found that A. was leaving his work without proper cause, but that he was killed owing to the unsafe state of the planking at the mouth of the pit. Held, reversing the judgment of the Court of Session, that the ruling of the Judge was wrong; that a master is liable for accidents occasioned by his neglect towards those whom he employs, while they are engaged in his employment,

¹ *Perry v. Marsh*, 25 Ala. 659.

eundo, morando, et redeundo; and that, whether A. had just cause for leaving his work or not, and though he were coming up for a cause of his own, still the defendant was responsible, being bound to take A. up just as safely as he let him down.¹ But an engineer upon a railroad, who has received an injury resulting from a defect in the locomotive of which he had charge, and from deficient fences, &c., must allege in his complaint, and prove, actual notice to the principal of the defects and deficiencies which occasioned the injury, or some of them. It is the duty of an engineer, confided to him by his employers, to make known to the company the defects of the engine he has the care of, and to guard against all accidents liable to happen by the escape of horses, &c., from adjoining lands, through the defect of fences or otherwise. He has the knowledge, or the means of knowledge, within his own power; and he is responsible, not only to the public, but to the company, if he does not give information of them.²

25. But while, on principles of public policy, a master is liable to third persons for the misfeasance, negligence, or omissions of duty of his servant, while acting within the scope of his employment; the courts have refused, upon considerations peculiar to the relation of master and servant, to apply this rule to cases, where one receives an injury from the negligence of another, while both are acting in the common business of the same master.³ It is said, "They have both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the

¹ *Marshall v. Stewart*, 33 Eng. L. & Eq. 1.

² *McMillan v. Saratoga, &c.* 20 Barb. 449.

³ *Walker v. Bolling*, 22 Ala. 294;

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23 Penn. 384; *Sherman v. the R. & S. Railroad Co.* 15 Barb. 574; *King v. Boston, &c.* 9 Cush. 112; *Madison, &c. v. Baron*, 6 Ind. 205.

part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."¹ Thus where a laborer on a gravel-train, riding in a gravel-car from his boarding-place to the place of his work, is injured through the carelessness of the engineer, or by a collision, caused by the negligence of the company's servants in charge of the train; the railroad corporation are not responsible.² So the plaintiff was employed as a trackman, to follow, in a hand-car, passenger trains over a certain part of the defendants' road-track, to keep it in order and report defects; and, while engaged in this duty in the evening, was run over and injured by a train of defendants' cars, without lights, not usually passing at that hour, and through negligence, as was claimed, of its managers. Held, the defendants were not liable.³ Nor is it material that the plaintiff is under age.⁴ Nor that both servants were not in the same employment.⁵ It is sufficient that both servants are engaged in the *same general business*; that, though the employments of the agents are distinct, both are necessary in the prosecution of a common enterprise.⁶ And the general rule more especially applies, if the plaintiff himself has also been guilty of negligence. Thus, where several servants were engaged in the same work, and one of them was injured by an act of negligence in which all participated, the master being absent at the time; held, in a suit brought against the master for the injury, that the servant could not recover, though the act complained of was done under the superintendence of a servant appointed by the master.⁷ But, upon the ground of the public obligation resting upon a railroad corporation, to keep their road safe for all legally upon it; not because of the contract between

¹ Hutchinson v. The York, &c. 5 Exch. 351.

² Ryan v. Cumberland, &c. 23 Penn. 384; Gillshannon v. Stony Brook, &c. 10 Cush. 228.

³ Coon v. The Syracuse, &c. 1 Seld. 492.

⁴ King v. Boston, &c. 9 Cush. 112; Brown v. Maxwell, 6 Hill, 592.

⁵ Ryan v. Cumberland, &c. 23 Penn. 384; Gillshannon v. Stony Brook, &c. 10 Cush. 228.

⁶ Coon v. The Syracuse, &c. 1 Seld. 492.

⁷ Brown v. Maxwell, 6 Hill, 592.

the companies, to which he was not privy, it is held that the engineer of a railroad company, conducting a train over a section of road belonging to another corporation, in accordance with a mutual contract so to do, may recover damages against that corporation, for injuries sustained by reason of the negligence of one of its servants.¹ And the rule, that the principal is not liable to one agent, for an injury occasioned by the negligence or misconduct of another, does not apply to slaves. Thus where a slave, hired as carpenter on board a steamboat, is killed by the misconduct of the master, the owner of the steamboat is liable.²

26. Where the plaintiff, a painter in the employ of the defendant, sustained an injury from the failure of a scaffolding upon which he was working, and which had been erected by another servant of the defendant; it was held a wrong instruction, that, if the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or *if the person employed by the defendant to erect it was incompetent*, the plaintiff was entitled to recover.³ But the qualification of the general rule requires to be stated, that a master is not held responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant, while they are acting in one common service; *provided the latter is a person of ordinary skill and care*, and the master uses reasonable care in his selection. Thus the defendants, being the contractors for large works, employed M. to do part of the works by the piece, for a certain sum payable by monthly instalments, according to the work done, the defendants finding the tools. W., who was then in the defendants' service, was taken by M. from his work, and put to assist in the piece-work at weekly wages, but, in accordance with the general regulations at the defendants' works, W. was paid his wages weekly by the defendants with their

¹ *Sawyer v. Rutland, &c.* 1 Williams, 370.

² *Tarrant v. Webb*, 37 Eng. L. & Eq. 281.

³ *Scudder v. Woodbridge*, 1 Kelly, 195.

other workmen. M., who, before the contract piece-work, had also been in the defendants' employment at weekly wages, drew from the defendants money in that character, the whole being charged against him and deducted from the amount of the instalments when payable. W. having been killed while at work on the piece-work by the negligence of the defendants' servants; held, that W. and M. were both the servants of the defendants, and therefore that the administratrix of W. could not maintain an action against the defendants for the negligence of the defendants' other servants, *who were reasonably fit and competent for the service in which they were employed*.¹ And the general rule has been held not to apply to the case of a day laborer employed by a railroad company from day to day, who was injured in returning from work on the company's cars, through an accident occasioned by the misconduct of the engine-driver.² Thus the plaintiff was in the employ of a railroad company, his business being, with other laborers, to ballast part of their road, excavating gravel from certain banks, loading it in gravel cars, and then distributing it along the track. Some of the workmen, among them the plaintiff, lodged in a village two miles from the gravel banks, and, by agreement with the company, were to be conveyed to the village for meals and lodging, and then back to the banks. While so employed, the plaintiff, during his conveyance on a gravel-car to the banks, to work, by the gross negligence of the engineer of the train he was riding on, was injured. Held, the company was liable.³ And it has been doubted whether the rule applies, where the employment of the servant who is injured is wholly distinct from that of the servant by whose negligence the injury was occasioned.⁴

26 a. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, (as to take personal property, which, al-

¹ *Wiggett v. Fox*, 36 Eng. L. & Eq. 486; 6 Hill, 592.

² *Russell v. Hudson*, &c. 5 Duer, 39.

³ *Fitzpatrick v. New Albany*, &c. 7 Ind. 436.

⁴ 5 Duer, 39.

though claimed adversely by another, he has reasonable ground to believe belongs to his principal,) the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency. And on such promise, case and assumpsit are equally maintainable; but, in either action, the declaration must allege a breach.¹ Thus an agent, who, acting under the direction of his principal, cuts down timber on the land of a third person, may recover of his principal the amount of a judgment recovered against him for the trespass by the owner of the timber cut, his principal having received and disposed of the timber.² If the declaration is in case, to recover indemnity from the principal, for damages recovered in trespass against the agent, by the true owner of the property taken; it must negative the existence of any knowledge on the part of the agent at the time of the taking, that he was committing a trespass, although the *onus* of proving such knowledge may be on the principal.³ (a)

27. In reference to the question, whether *the right of*

¹ Moore v. Appleton, 26 Ala. 633.

² Moore v. Appleton, 26 Ala. 633.

³ Drummond v. Humphreys, 39 Maine, 347.

(a) With regard to the right of the master to *chastise* his servant, it has been held that a master has no right to flog a choir-boy of a cathedral for singing at private parties without his leave. Newman v. Bennett, 2 Chit. R. 195.

If a person, hired on an annual service as *clerk*, claim to be *partner*, although in a respectful manner and *bonâ fide*, he may be dismissed without notice. Amor v. Fearon, 1 Per. & Dav. 398.

Where a party has entered into a contract to serve another for a year, and is wrongfully dismissed by his employer before the expiration of his time of service, he may bring an action immediately for any special injury which he may have sustained by such dismissal. Rogers v. Parham, 8 Geo. 190.

Where an *apprentice* is not a party to the indenture of apprenticeship, his remedy for non-performance by the master is by an action on the case. McGunigal v. Mong, 5 Barr, 269.

action for an injury committed by a third person is in the master or the servant; it is held that an action on the case lies in the name of the principal, for a false representation made to the agent, whether he be a factor, commission-merchant, or clerk.¹ (a) So where an agent, without disclosing the name of his principal, makes a contract with a common carrier to transport the property of the principal, the latter may maintain an action in his own name against the carrier, to recover damages for the loss of the property.² But a servant may maintain an action of tort for an injury to himself, although an action for breach of contract connected with such injury must have been brought by the master. Thus a servant, travelling with his master on a railway, may have an action in his own name against the company for the loss of his luggage, although the master took and paid for his ticket. The liability of the company is independent of the contract.³ And master and servant

¹ *Raymond v. Howland*, 12 Wend. 176; *Tuckwell v. Lambert*, 5 Cush. 23.

² *Elkins v. Boston, &c.* 19 N. H. 337.
³ *Marshall v. The York, &c.* 7 Eng. L. & Eq. 519.

(a) When one dealing with an agent induces the latter to set off a debt, due from the agent personally to him, against one due from himself to the principal, it is a fraud on the principal, and not binding upon him, unless he ratifies the transaction, with full knowledge of all the facts. *McNair v. McLennan*, 24 Penn. 384.

Where a broker pledges the goods of his principal as his own, the pawnee cannot claim to retain against the principal, in trover, for the amount of the lien, which the broker had on the goods for his general balance, at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *M'Combie v. Davies*, 7 E. 5.

If an agent, authorized to sell goods for money only, sells his own goods and those of his principal in one sale, receiving payment in money and other property, and, while selling his own goods, for the purpose of defrauding his creditors, sells with them, in his own name, the goods of his principal; the principal cannot rescind the sale. *Moore v. Thompson*, 32 Maine, 497.

may also bring separate and successive actions against the same party for an injury to the servant. Thus, in case of the battery of a servant. And recovery in one action may not be pleaded in bar of the other.¹

28. This leads to the further remark, that an action lies in favor of the master against a third person, for an injury done to the servant, whereby the master is deprived of his service. Thus the hiring of a person of full age, for wages by the year, creates the relation of master and servant, and enables the employer to maintain *case* against one who imprisons the person employed, for the loss of his services.² (a) So it was held that the plaintiffs might sue the defendant in *case*, for loss of services of their traveller, by an accidental collision with the defendant; that the damage was not too remote, though trespass would have been the proper remedy had the servant been the plaintiff.³ And, in such action, the *damage* alone is not the cause of action, but the illegal act and the damage together. Hence, in an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for *prospective* damage. He could not bring a fresh action as often as fresh damage resulted.⁴ So, in an action of trespass for forcibly invading a plantation, carrying off some of the slaves, and frightening all the others away, the plaintiff may give in evidence the consequential damages necessarily resulting from the loss of hands, including the loss of cordwood floated off by the rising of the river, and the injury to the corn crop by the neighbor's cattle breaking into the cornfield.⁵

¹ Savil v. Kirby, 10 Mod. 385.

⁴ Hodsoll v. Stallebra, 3 Per. & D.

² Woodward v. Washburn, 3 Denio, 200; 11 Ad. & Ell. 301.

369.

⁵ 13 How. 447.

³ Martinez v. Gerber, 3 Scott, N. 386; 3 M. & Gr. 88.

(a) In order to maintain such action, it is not necessary that the servant be hired at any certain wages or salary. Martinez v. Gerber, 3 Scott, N. 386.

29. An action also lies, for *seducing a journeyman* to leave his employer.¹ So the rule is not confined to *menial* servants, or to such as fall within *the statute of laborers*, but extends to all cases, where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service, for a given time, under the direction of an employer, who is injured by the wrongful act; and wherever there is at the time of the persuading a binding contract, whether the service be then actually subsisting or not. Thus a declaration, by the lessee of a theatre, charged that one J. W. had contracted with the plaintiff to sing at his theatre, and not elsewhere, during a certain term, without the plaintiff's consent, and that the defendant had during the term maliciously enticed and procured J. W. to depart from her said contract, against the will of the plaintiff, whereby J. W. refused to sing for the plaintiff at his theatre during the whole of the term. Also, that J. W. had been hired by the plaintiff as, and was, his dramatic artiste, for a certain term, and that the defendant had maliciously enticed and procured her to depart from her said employment during the said term. All the counts alleged special damage. On demurrer, held, that the action was maintainable at common law.² So an action will lie, for *continuing* to employ the servant of another after notice, though the employer did not procure the servant to leave his master, or know when he employed him that he was the servant of another.³

30. An action on the case lies for seducing and harboring the slave or servant of the plaintiff, notwithstanding a penalty given by statute; which is a cumulative remedy.⁴ But no action lies for seducing a servant from his master, if the servant has paid the penalty stipulated by his articles for leaving him. As where the master had recovered the penalty, in an action of debt brought by him against the servant, before he commenced the present action; although the

¹ Hart v. Aldridge, 6 Mod. 101.

³ Blake v. Lanyon, 6 T. R. 221.

² Lumley v. Gye, 20 Eng. L. & Eq.
168.

⁴ Scidmore v. Smith, 13 Johns. 322.

debt and costs were not actually paid to him till after the commencement, though before the trial of it.¹

31. In an action on the case for employing a runaway slave, alleging notice that the negro was the runaway slave of the plaintiff; he must prove the *scienter*, unless from the circumstances the law would presume it.² And an action on the case, brought by a father for the enticing away of his son from his service, is not supported by proof that the defendant, knowing that the son had left his father's service without his father's consent, induced him to enter into the service of the defendant, and detained him when he wished to return.³

32. A peculiar class of *agents* consists of *attorneys at law*, whose rights, duties, and liabilities may therefore properly be considered in the present connection.

33. It is held, that the highest degree of *fairness and good faith* is expected and exacted of attorneys in their dealings with clients;⁴ (a) and that an attorney is responsible for *ordinary skill, diligence, and care* in the exercise of his profession;⁵ and is liable for *ordinary neglect*; and the skill required has reference to the character of the business which he undertakes to do.⁶ (b) It is said: "It would be

¹ Bird v. Randall, 3 Burr. 1345; 1 W. Bl. 387.

² Bell v. Lakin, 1 M'Mullan, 364.

³ Butterfield v. Ashley, 2 Gray, 254.

⁴ Jennings v. McConnel, 17 Ill. 148.

⁵ Holmes v. Peck, 1 R. I. 242.

⁶ Cox v. Sullivan, 7 Geo. 144.

(a) Courts of chancery have jurisdiction, in all cases between client and attorney, in which the latter has taken advantage of his position to defraud the former. And the burden of proof is on the attorney, to show the fairness of their transactions. Jennings v. McConnel, 17 Ill. 148.

(b) An attorney or solicitor, who, on payment of his bill, delivers up papers that have been intrusted to him, is bound to deliver them up in a reasonable state of arrangement, so that the party to whom they are delivered may not be put to unreasonable trouble in sorting them. Northwestern, &c. v. Sharp, 29 Eng. L. & Eq. 555.

The client is not bound to any diligence, unless stipulated for. Cox v. Sullivan, 7 Geo. 144.

extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases for which he is undoubtedly responsible."¹ And, with regard to the precise measure of an attorney's liability; on the one hand it is held to be a fair presumption, that an attorney acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred.² It is said: "Attorneys ought to be protected when they act to the best of their skill and knowledge; and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt, which he was employed to recover for his client, from the person who stands indebted to him."³ So it is held that an attorney is liable only for *gross negligence* or *gross ignorance*; and is entitled to the benefit of the rule, that every one shall be presumed to have discharged his legal and moral obligations, until the contrary shall be made to appear. And, when made to appear, the extent of the damages must also be affirmatively shown. Thus, where the amount of a note is alleged to have been lost by his negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent. Unless the latter be shown, he would be liable only for nominal damages; and under no circumstances would he be liable for more than the actual damages sustained by his negligence.⁴ But on the other hand it has been held, that under some circumstances the law throws upon an attorney, regularly employed to conduct a cause, the burden of prov-

¹ Per Tindal, C. J. *Godefroy v. 4 Burr.* 2061. See *Godefroy v. Dalton*, 6 Bing. 467.

² *Holmes v. Peck*, 1 R. I. 242.

³ 6 Bing. 467.

⁴ Per *Ld. Mansfield*, *Pitt v. Yalden*,

⁵ *Pennington v. Yell*, 6 Eng. 212.

ing that his client has not been injured by his negligence in that behalf. Thus, where the defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the plaintiff had retained him to defend; the negligence being proved, held, it was for the attorney to defend himself by showing that the plaintiff had no defence in that action, and not for the plaintiff to show that he had a good defence, and so had been damaged by the judgment by default.¹ What is reasonable care and skill, is a question for the jury. The Judge is not bound to define it.² The testimony of *experts* is sometimes admissible.³ (a)

34. The most frequent claims against attorneys relate to alleged negligence in connection with suits at law. Thus it is held that an attorney, bringing an action for his client, within a limited jurisdiction, on a cause of action arising out of such jurisdiction, is liable for negligence.⁴ So an attorney, before he takes upon himself to sue out a writ in a court of peculiar constitution, is bound to ascertain that the court has machinery to carry out the object of the action.⁵ So, where an attorney for the plaintiff suffered the case to be called on, without previously ascertaining whether a material witness, whom the plaintiff had undertaken to

¹ Godefroy v. Jay, 7 Bing. 413.

⁴ Williams v. Gibbs, 6 Nev. & Man.

² Parker v. Rolls, 14 Com. B. 691; 788.

6 Eng. 212.

⁵ Cox v. Leech, 38 Eng. L. & Eq.

³ Pennington v. Yell, 6 Eng. 212.

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(a) In an action against an attorney for negligence, as such, the fact that the plaintiff continued to employ him, after knowing of such negligent conduct, is evidence on the question of damages. *Derrickson v. Cady*, 7 Barr, 27.

Proceeding on motion against an attorney for money collected is no bar to a recovery in an action on the case for damages. *Coopwood v. Baldwin*, 25 Miss. 129.

Partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable on the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract; and a right of action against the firm survives against the survivor alone. *Livingston v. Cox*, 6 Barr, 360.

bring into court, had arrived, in consequence of which the plaintiff was nonsuited; in an action against him for negligence, held, that it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and, the jury having found in the negative, the Court refused to disturb the verdict.¹ (a) So an attorney is bound

¹ *Reece v. Bighy*, 4 B. & Ald. 202.

(a) In a suit against an attorney for neglecting to defend an action, his declarations made to the Court when the action was called on for trial, that he had no defence to make, because his client, though requested to instruct him in a defence, had not done so, are admissible in evidence; not to prove the truth of the facts stated, but the circumstances which occurred at the time of the alleged negligence. *Salisbury v. Gourgas*, 10 Met. 442.

In an action against attorneys for negligence and unskilfulness, a count is sufficient, which alleges that they conducted the suit so negligently and unskilfully, "in not having a certain writ of attachment, affidavit, and declaration, before then prepared by them in said action, prepared, drawn up, and filed, and made out according to the laws of said State and rules of said court, that the said plaintiff, by the said neglect of, &c., was hindered and prevented from recovering judgment, &c., and was forced and compelled to release and dismiss the levy of said writ of attachment," or "by reason whereof the said plaintiff has been prevented from recovering her demand," &c. Or a count which alleges that the defendants, through want of care and skill, "did dismiss the levy of a certain writ of attachment," before that time levied on the property of the defendants therein, and "did dismiss, relinquish, and release all liens which had attached or accrued by virtue of said levy," &c., and that, by means of the unskilful management of the defendants, the plaintiff "lost her said demand, and the means of recovering and collecting the same." *Walker v. Goodman*, 21 Ala. 647.

The distinction is made, that, when an attorney undertakes the collection of a debt, it becomes his duty to sue out all processes, both mesne and final, necessary to effect that object; and not only the first execution, but all such as may become necessary. Also, to pursue bail, and those who may have become bound with the defendant, in the progress of the suit, either before or after judgment. But not to institute new collateral suits, without special instructions, such as actions against the sheriff and clerk for the failure of their duty. *Pennington v. Yell*, 6 Eng. L. & Eq. 212.

When an attorney died, twelve days before the return-day of an execution, in a case where real estate had been attached by the original writ,

to sue out the proper process against bail.¹ So against an officer for taking insufficient bail, or not delivering over the bail-bond.² So he is bound to deliver an execution to an officer in season to preserve an attachment.³ But not to attend in person to the levy of an execution.⁴ Nor search for property.⁵ Nor to convey to a sheriff his client's directions for seizing goods on an execution.⁶ But an action lies against an attorney, for neglecting to charge a person in execution at his client's suit, according to a rule of court; although the omission was rather from want of judgment than from negligence.⁷ And, in such action, the question, what is reasonable skill, is for the jury. So, when an attorney takes the responsibility of dismissing a suit, on receiving in payment claims against other parties, he renders himself liable for the amount of the claim on which the action was founded, unless he proves that a judgment on that claim would have been of no value.⁸

35. In regard to the collection and appropriation of money, it is held that an attorney, who takes a note to collect, is not chargeable with it, unless he has received the money and

¹ *Dearborn v. Dearborn*, 15 Mass. 316; 6 Eng. 212.

² *Simmons v. Bradford*, 15 Mass. 82; *Crooker v. Hutchinson*, 1 Verm. 73.

³ *Phillips v. Bridge*, 11 Mass. 246.

⁴ *Williams v. Reed*, 3 Ib. 405; *Pennington v. Yell*, 6 Eng. 212.

⁵ 6 Eng. 212.

⁶ *Ford v. Williams*, 3 Kern. 577.

⁷ *Russel v. Palmer*, 2 Wils. 325.

⁸ *Coopwood v. Baldwin*, 25 Miss. 129.

without having levied the attachment, and the attachment, not being subsequently levied, was lost; it was held, that the attorney was not liable for damages for the loss of the attachment. *Holmes v. Peck*, 1 R. I. 242.

But where, a trader having petitioned the Court of Bankruptcy under the 211th section of the 11 & 13 Vict. c. 106, an order was made under § 219, that his estate and effects should be possessed and received by the official assignee, and be taken possession of by the messenger; and one of the creditors employed the plaintiff (an attorney) to prepare an assignment of his effects for the benefit of the general body, informing him that all would concur therein; and, the assent of all the creditors not having been obtained, the assignment became unavailing; it was held, that the plaintiff was not guilty of gross ignorance or gross negligence in preparing the assignment under such circumstances. *Lewis v. Collard*, 14 Com. B. 208.

refused to pay it over, or unless he might have made it, and has not, through his neglect, or unless the debt has been lost through his unskilfulness.¹ But if he collects money under the direction and in the name of an agent, knowing that it belongs to the principal, and by order of the agent pays it in discharge of debts of the agent; this is not a discharge of the attorney from his liability to his principal.² (a)

36. In regard to the sufficiency of securities taken by an attorney, or the investigation of titles to estates; where a solicitor had invested his client's money, on security which proved altogether insufficient, it was held that this was such gross negligence as almost to amount to fraud; and that the client could claim the amount, in a suit for the administration of the solicitor's estate, without establishing the client's right at law.³ So an attorney employed to record a mortgage, but who neglects to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default.⁴ (b)

¹ Nisbet v. Lawson, 1 Kelly, 275.

² Ibid.

³ Smith v. Pocock, 23 Eng. L. & Eq. 470.

⁴ Miller v. Wilson, 24 Penn. 114.

(a) If an attorney realize a fund upon a judgment in his own favor out of his client's debtor, he is not bound to apply the fund to the satisfaction of his client's debt. Cox v. Sullivan, 7 Geo. 144.

Where a solicitor allowed shares belonging to a client to be forfeited by neglect, and afterwards replaced such shares, giving less than would have originally been paid; held, the client could only claim to be placed in the same position as if the shares had never been forfeited. Smith v. Pocock, 23 Eng. L. & Eq. 470.

The damages, to which an attorney is liable for neglect, do not necessarily extend to the whole amount of the debt which he assumes to collect, but only to the loss which his client has actually sustained. Cox v. Sullivan, 7 Geo. 144.

(b) The plaintiff employed the defendant, an attorney, to sue A. for a debt. A., to induce the plaintiff to forbear to sue, offered to give him a mortgage on some freehold property in which he had a reversionary interest. The plaintiff agreed to accept it, under the advice of the defendant,

37. Whether negligence can be set up as a defence to an action for an attorney's bill of fees, is a point which has

who was accordingly employed by him to act as his attorney in respect of the mortgage transaction, and to prepare the mortgage deed. The defendant stated to his clerk, that he must write to his town agents to make the necessary searches, to see whether A. had taken the benefit of any of the insolvent acts. No such letter appeared to have been written, but he sent his clerk to inquire personally of A. whether he had ever been insolvent. A. denied that he had, and the mortgage was executed, and the proposed action was dropped. A. had in fact previously petitioned the insolvent court, and obtained an order for his protection. Held, this action, for neglect and unskilfulness, was maintainable, since the defendant, by his own language and conduct, showed that he had a suspicion on the subject, and felt that it was his duty to make a search, which he had not done. *Cooper v. Stephenson*, 12 Eng. L. & Eq. 403.

In an action for negligence against an attorney, employed by a purchaser to inspect the title, it appeared, that, by indentures of lease and release, of the 9th and 10th of October, 1796, the estate had been conveyed to A., the father of the vendor's wife, and to B., to hold unto the said A. and B., and their heirs and assigns, to the use and behoof of the said A. and B., and the heirs and assigns of the said A. forever, the estate of B. being used only in trust for A., his heirs and assigns. A. devised the estate to his daughter, and to the heirs of her body; but, in case she died, without leaving any issue of her body living at her decease, then to his nephew C. and his heirs forever. The daughter, afterwards, by bargain and sale of the 11th of February, 1814, conveyed the estate to one D., to the intent that he might become tenant of the freehold, for the purpose of suffering a recovery, which was accordingly suffered. The daughter, afterwards, by deeds of lease and release of the 4th and 5th of March, 1814, executed upon her marriage, reciting that she was seized in fee-simple of the estate, conveyed the same to two trustees, in trust for her and her husband and their issue, and, in default of issue, to such person as she should appoint. The marriage was afterwards solemnized, and the daughter died without issue, and devised the estate in fee to her husband, who survived her. The husband, having contracted to sell the estate to the plaintiff, delivered to the defendant, as attorney to the vendee, an abstract of his title, containing the deeds of the 9th and 10th of October, 1796, but not certain indentures of lease and release of the 25th and 26th of February, 1814, whereby B. conveyed the estate vested in him to the daughter of A. in fee; but an abstract of these deeds was delivered by the vendor's solicitor to the defendant, four months before the conveyance of the estate was executed. The defendant

been much questioned. If the services have proved entirely useless, it has long been agreed, that this may be shown in bar of the whole action; and, after some conflict of opinions, the weight of authority seems in favor of admitting any competent evidence of negligence, ignorance, or want of skill, as a defence to an action for professional services, as well as for any other work and labor.¹ It is said, in order to recover his bill of costs, the attorney is bound "to show affirmatively that he has done all that he ought to have done."² Thus, the defendant having insured in London goods on a voyage to Calcutta, and the goods having been damaged on the voyage, the defendant instructed the plaintiff, an attorney, to take steps to obtain compensation from the underwriters. The plaintiff wrote letters to them, demanding payment; and, this being ineffectual, took out writs against them in the lord mayor's court, and, after issue joined, applied for a commission to examine witnesses in India, which that court had no power to grant, and the actions were accordingly discontinued. The plaintiff having sued the defendant for his costs; held, that the plaintiff, from the

¹ 2 Greenl. Ev. § 143.

² Per Ld. Tenterden, *Allison v. Rayner*, 7 B. & C. 441.

laid before counsel a case, containing an abstract of the deed of the 11th of February, 1814, and of the recovery suffered in pursuance of it, of the deeds of the 4th and 5th of March, 1814, and of the will of the daughter of A., but omitting altogether the deeds of the 9th and 10th of October, 1796; and it further stated that A. was seised in fee of the premises. The opinion of counsel was, that the vendor had a good title, but that opinion would not have been given, if the deeds of lease and release of the 9th and 10th of October, 1796, or those of the 25th and 26th of February, 1814, had been stated. The plaintiff, afterwards, being advised that his title was incomplete, paid a sum of money to C., the devisee in remainder, for a confirmation of his title. Held, first, that the recovery was invalid, because at that time the legal estate for life was in B., and she was only equitable tenant for life, with a legal remainder in tail, and, therefore, that the title was bad; and that a jury were warranted in finding the defendant guilty of negligence, so as to make him liable in this action. *Ireson v. Pearman*, 3 B. & C. 799.

nature of the defendant's claim, must or ought to have known, that it would be necessary to take the evidence of witnesses in India, and was bound to have ascertained, before suing there, that the lord mayor's court could issue a commission, and, therefore, could not recover his costs; but that he might recover for the letters, as they might have produced payment.¹ So an attorney received from O. and A., agents of C. L. & Co., of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they (O. and A.) alleged to be "unpaid and duly protested in their hands." A copy of one of the bills was sent to the attorney, with a note stating them to be all indorsed to C. L. & Co. The attorney thereupon brought the action in the names of O. and A., and discovering afterwards, when the bills were for the first time shown to him, that there was no special indorsement to O. and A., as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co. Held, that the suing in the names of O. and A., without having first ascertained that they were in a position to maintain an action on the bills, was such gross negligence, as to disable the attorney from recovering the costs of the abortive action.²

38. In relation to the liability of an attorney to a party wrongfully sued; it has been held, that, where a writ of *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass.³ So an action for false imprisonment lies against the plaintiff's attorney, who sues out a void *ca. sa.*, and delivers it himself to the officer, who, by his order, arrests the defendant thereon.⁴ (a) So if an attorney, who has commenced a suit,

¹ Cox v. Leech, 38 Eng. L. & Eq. 271.

³ Codrington v. Lloyd, 3 Nev. & Per. 442; 8 Ad. & Ell. 449.

² Long v. Orsi, 37 Eng. L. & Eq. 253.

⁴ Barker v. Norwood, 2 W. Black. 866.

(a) In an action of trespass against the petitioner's attorney, for falsely and maliciously imprisoning the plaintiff; upon a plea of Not Guilty, the

knew that there was no cause of action, and dishonestly, and for some sinister view, ill purpose, or purpose of his own, which the law calls malicious, caused a party to be arrested and imprisoned; he will be liable therefor. So if he knows that his client is actuated by illegal or malicious motives. And it is not necessary to show a conspiracy between attorney and client. It is a sufficient averment, that he falsely and maliciously, without having any reasonable or probable cause for so doing, sued out the writ, and falsely and maliciously caused the party to be arrested under it.¹ So if an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained.² But an attorney, who merely issues an execution, and communicates to the sheriff the directions of his clients to seize thereon specified property, is not liable as a trespasser, though the seizure is wrongful. Nor although, pursuant to the authority and direction, and in the name of the plaintiff, he executes a bond of indem-

¹ *Burnap v. Marsh*, 13 Ill. 535.

² *Barber, in re*, 6 Eng. L. & Eq. 338.

plaintiff proved that the defendant had indorsed his name and address on the warrant sued out for the petitioner, on which the plaintiff was committed. Held, sufficient evidence to support a verdict for the plaintiff on such plea. And the doctrine was laid down, that an attorney, who deliberately directs the execution of a warrant, is liable in trespass if it prove bad. And, although it seems, the act of the attorney, in handing over the warrant for execution, might be so divested of any further proof of concurrence on his part, that he would not be liable; he is liable, if his conduct in or after the performance of such act shows a motive beyond the mere wish to discharge professional duty; as if, after the commitment, he has improperly delayed giving information as to costs, which was required by parties wishing to pay such costs and thereby purge the contempt. *Green v. Mathew*, 5 Ad. & Ell. N. S. 99.

nity to the officer. Nor is such bond invalid, for want of authority under seal to execute it; such an instrument binding the principal as his simple contract, it not being required by law to be under seal.¹ (a)

¹ Ford v. Williams, 3 Kern. 577.

(a) Attorneys, partners, delivered to a bailiff, for the purpose of being executed, a precept, issued from a local court, indorsed with the attorneys' names, and directing a levy upon goods within the jurisdiction. The attorneys carried on business at Falmouth; and the party to be levied upon had had for many years a house and goods at Penryn, and was not known to have a residence or property elsewhere. The levy was made in that house. The attorneys had sent a message to the debtor, as to the time at which the bailiff would levy; and the bailiff, while levying, said that he was employed by those attorneys. In an action against them and the bailiff for unlawfully levying, the attorneys pleaded, 1. Not Guilty. 2. A justification under the process. The bailiff pleaded the justification only. The plaintiff replied, that the house was not within the jurisdiction; and issues were joined thereon. Held, 1. That the attorneys were not entitled to an acquittal at the close of the plaintiff's case, in which the facts had appeared as above stated. 2. That on the close of the whole case, nothing material having been added, except that the defendants, though they proved a regular judgment, failed to bring themselves within the jurisdiction, the Judge ought to have told the jury, that there was no evidence to implicate the attorneys. And this, even assuming them to have known that the bailiff intended levying at the house in question; although, if they had known also that the house was beyond the jurisdiction, they might possibly have been considered joint trespassers with the bailiff. *Sowell v. Champion*, 6 Ad. & Ell. 407. See *Oakley v. Davis*, 16 E. 82.

Cases have arisen, between attorneys, and other persons, not parties, connected with the cases in which such attorneys were employed. Thus A., a defendant's attorney, requested B., the plaintiff's attorney, to forbear charging the defendant in execution until next term, falsely represented to B. that he had the authority of the defendant to consent thereto; and gave a consent in writing to that effect, which omitted to state that the proceedings were stayed at the request of the defendant, according to the rule. B. forbore to charge the defendant in execution until the next term, and the defendant was discharged for the above reason. Held, no action was maintainable by B. against A. *Hewitt v. Melton*, 1 Crompt. M. & R. 232.

A sheriff declared in case, for that, the defendants being attorneys of P., who had sued out a *ca. sa.* against John Wright, and the sheriff having in

custody (under another *ca. sa.*) another John Wright, who was entitled to his discharge, the defendants, well knowing the premises, falsely represented to the sheriff that the last-mentioned J. W. was the J. W. against whom P.'s writ had issued; by means whereof the defendants caused the sheriff to detain the J. W. who was in his custody; for which the last-mentioned J. W. sued the sheriff, and he paid money by way of compromise. The attorneys pleading Not Guilty, evidence was given, for the sheriff, that his officer delivered a note to the defendant's managing clerk in P.'s action, describing the John Wright who was in custody, and inquired if that was the John Wright whom they had sued on behalf of P.; and that the clerk took the letter into the office where the defendants were, and afterwards returned and told the officer that that was the John Wright; neither the defendants nor the clerk at that time knowing the contrary. Held, by the Court of Queen's Bench, that, on this evidence, the jury were warranted in finding for the sheriff; an action being maintainable for the misrepresentation, and the defendants being liable, under the circumstances, for the misstatement of their clerk. Also, that the action lay, though the detainer was made, and the money for compromise paid, by the sheriff's officer, and not by himself.

But, held by the Court of Exchequer Chamber, that a plea, alleging that the defendants had good and probable reason to believe, and did with good faith believe the representation to be true, was an answer to the action. The Court of Queen's Bench having given judgment for the plaintiff *non obstante veredicto* on this plea, judgment reversed. *Evans v. Collins*, 5 Ad. & Ell. N. S. 804.

CHAPTER XXVII

TORTS CONNECTED WITH THE RELATION OF HUSBAND AND WIFE.

1. Action by the husband alone.
3. By husband and wife.
5. By the wife alone.
6. Against husband and wife.

15. Mutual personal rights of husband and wife.

17. Action for criminal conversation or seduction, and for enticing away or harboring a wife.

1. A HUSBAND may in many cases maintain an action alone for an injury to his wife.

2. A declaration in *trespass*, for entering the plaintiff's house, taking his goods, and falsely imprisoning his wife, is good after verdict; and the injury to the wife shall be taken as matter of aggravation only.¹ So, where an action is brought merely for damage to the real estate of the wife, during coverture, the husband may sue alone, or the wife may be joined in the suit.² So under a conveyance of lands to husband and wife in fee, they hold not in moieties but in entireties. And the husband may maintain, in his own name, an action of trespass *qu. claus.* for cutting down and carrying away timber.³ So, a husband having by law a right to the services of his wife, whether he requires them or not, and being bound to sustain her, in sickness and in health, anything that diminishes the value of the right, or increases the burden of the duty, necessarily occasions a pecuniary loss to the husband. Hence he may maintain an action for slanderous words spoken of the wife, affecting her health and spirits, without proving that her services were of any value, or that he has paid out anything for medicine and

¹ *Heminway v. Saxton*, 3 Mass. 222.

³ *Fairchild v. Chastelleaux*, 1 Penn.

² *Tullmadge v. Grannis*, 20 Conn. 176.
296.

attendance.¹ (See i. 259, 328.) So a husband may maintain replevin for personal chattels belonging to his wife at the time of the coverture, without joining her in the suit.² Or an action for malicious prosecution of the wife.³ But a husband, whose wife has been injured by reason of a defect in a highway, cannot maintain an action against the town, to recover for medical and other expenses incurred, or for loss of his wife's services, in consequence of such injury.⁴ So, where the husband distrains and avows for rent arising from the land of the wife, without joining her in the proceedings, he must show affirmatively that the rent accrued after the marriage; for this cannot be intended, and, if it be not shown, the objection may be taken at the trial.⁵ (a)

3. But in many cases the action for injury to the wife should be brought by the husband and wife jointly. Thus an action of trespass may be maintained by husband and wife, against a party who drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury.⁶ So, in an action against a town, for an injury done to the wife through a defect in a highway, the wife must be joined.⁷ And in such action for *bodily injury* suffered by the wife, the damages may include loss of labor and the expense of a cure.⁸ (b)

¹ *Olmstead v. Brown*, 12 Barb. 657.

⁵ *Decker v. Livingston*, 15 Johns.

² *Brown v. Fitz*, 13 N. H. 283.

479.

³ *Smith v. Hickson*, Rep. t. Hardw.

⁶ *Hopper v. Reeve*, 1 Moore, 407.

56.

⁷ *Starbird v. Frankfort*, 35 Maine, 89.

⁴ *Harwood v. Lowell*, 4 Cush. 310.

⁸ *Sanford v. Augusta*, 32 Ib. 536.

(a) In New York a married woman cannot maintain an action, in her own name alone, to recover damages for slanderous words spoken of her. *Klein v. Hentz*, 2 Duer, 633.

But a complaint, stating that the defendant, as a common carrier, undertook to carry the plaintiff, a married woman, and her baggage, which was her separate property, from San Francisco to New York, and a loss of the property while in the custody of the defendant, is good in substance under the code. *Spies v. Accessory*, &c. 5 Duer, 662.

(b) A *promise*, founded on a consideration relating to the wife's personal security, does not vest absolutely in the husband, but may be the subject of

So a suit to recover damages for personal property of the wife, sold under execution as the property of the husband, should be brought in the name of the husband and wife to the use of the wife.¹ So the wife is a proper party with her husband, in an action for trespass to the land of the wife before marriage.² But an action of trespass, for cutting trees on land held by husband and wife in right of the wife, may be brought by the husband alone, or by the husband and wife jointly, at his election.³ So husband and wife may join, in an action of the case for an obstruction of a way, appurtenant to the wife's land, in their occupation or possession.⁴ (a)

4. But, in many cases, husband and wife cannot join in

¹ *Keeney v. Good*, 21 Penn. 349.

² *Allen v. Kingsbury*, 16 Pick. 235.

³ *Hair v. Melvin*, 2 Jones, Law, 59.

⁴ *Cushing v. Adams*, 18 Ib. 110.

an action in the name of husband and wife. Thus the plaintiffs, husband and wife, on the trial of an action for a personal injury to the wife, may prove, that she gave money to him to buy a ticket for her passage in the cars to A.; that such a ticket was accordingly, procured for and received by her; and that she thereupon took her seat in the cars, to be conveyed to A. 21 Conn. 557.

Where the declaration, by husband and wife, for a personal injury to the wife, after stating the nature and extent of the injury, proceeded to allege, that, by means of such injury, she became sick, and was prevented from attending to her necessary affairs, and that the plaintiffs were thereby forced to, and did, necessarily expend two hundred dollars in endeavoring to effect a cure; held, although the plaintiffs could not recover, in the same action, for the wife's personal injury, and also for the expenses of her cure, yet, in this case, the ground of damages was the wife's personal injury alone, and the statement regarding the expenses of her cure was descriptive of the extent of her injury, and not a distinct and substantive ground of damages, and in that aspect, though unnecessary, was very proper; but if otherwise, yet, as the gist of the action was the breach of contract in not carrying the wife safely, and this was a ground on which the plaintiffs could recover, it will be presumed, after verdict, that the Court confined the evidence to that ground. *Fuller v. Naugatuck, &c.* 21 Conn. 557.

(a) Where husband and wife join in an action for an assault on the wife, no words or acts of the husband can be proved in mitigation of damages, unless the wife was privy to them. *Everts v. Everts*, 3 Mich. 580.

actions for injury to the wife. Thus in case by husband and wife against the defendant, for driving his horse and chaise against the plaintiff's chaise, by which the wife was thrown out, &c.; it was alleged, that the husband had lost the labor and comfort of his wife, and had been put to great expense in her cure, &c. After verdict for the plaintiff, judgment was arrested, because injuries were charged in the action, for which husband and wife could not join.¹ Nor can husband and wife maintain a joint action of trespass *qu. claus.*, unless it appears that the wife had some interest in the close.² Nor for an injury to her personal property after the marriage. Such action is bad, on demurrer, motion in arrest, or writ of error.³ So husband and wife cannot join as plaintiffs in replevin, unless where the property is held by the wife in some special character or right. And where a husband attempted to convey property to his wife and a third person as trustees, such conveyance being as to the wife void, it was held that a declaration, joining the wife, a subsequent husband, and the trustee, could not be maintained.⁴ And while the marriage is in full force, the wife should not be joined with her husband, although she lives separate from him, and the action be for an injury to property acquired by her labor or by gift to her.⁵ So a husband and wife cannot jointly sue for a joint slander or libel upon both. The husband should sue alone for the injury to him, and the husband and wife should join for the injury to her.⁶ And the general distinction is, that, when words spoken of the wife are only actionable on proof of special damage, the husband must sue alone; but where they are actionable *per se*, she may unite with her husband in bringing the suit.⁷

5. In cases of trust for the benefit of married women, they

¹ Barnes v. Hurd, 11 Mass. 59.

² Meader v. Stone, 7 Met. 147.

³ Rawlins v. Rounds, 1 Williams, 17.
See Owen v. Tankersley, 12 Tex. 405.

⁴ Van Arsdale v. Dixon, Hill & Denio, 358.

⁵ Moores v. Carter, 1 Hemp. 64.

⁶ Gazynski v. Colborn, 11 Cush. 10;
Hart v. Crow, 7 Blackf. 351.

⁷ Williams v. Holdredge, 22 Barb.

may sometimes bring actions in their own names. Thus, where a statute provides that any married woman, possessing property by virtue of that act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of the parties; an action for an injury to the property of the wife, though the control of it may have been released to the husband, must be brought in the wife's name.¹ So a bequest to a widow, for her own proper use during her lifetime, remainder over, gives her a separate use, and the executors of her after-taken husband, having converted the property, are liable to her in trover.²

6. The wife may sometimes properly be joined as defendant. But it is held, that if a chattel be in the possession of the husband, or in the family, along with husband and wife, a refusal by the wife to deliver it on demand is not a *conversion* by her. And a declaration in trover against husband and wife, alleging the conversion to have been, not by the husband alone, but by the defendants to their use, was held bad, on motion in arrest of judgment.³ But where a bailiff seized the goods of the plaintiff, under a *fi. fa.* against a third person, and deposited them in an out-building of an inn, with the assent of the innkeeper, whose wife assisted him in the management of his business; and, on a demand upon her to deliver up the goods, she said she had seen the attorney of the plaintiff in the original suit, that he had told her not to bother herself about them, he would see her harmless; and that she would not give them up; held, in an action of trover against the innkeeper and his wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her.⁴

¹ Collen v. Kelsey, 39 Maine, 298.

² Snyder v. Snyder, 10 Barr, 423.
See Daniel v. Daniel, 6 B. Mon. 230;
Huntly v. Ratcliff, 5 Ired. 542.

³ Rowell v. Keefe, 6 Rich. 521. *Contra*, Keyworth v. Hill, 3 B. & Ald. 685.

⁴ Catteral v. Kenyon, 2 Gale & Dav. 545; 3 Ad. & Ell. N. S. 310.

7. It is held, that where husband and wife commit a joint *assault*, he should be sued alone.¹ But the prevailing rule is, that a joint action of trespass may be maintained against husband and wife, for a joint assault and battery by them; and there may be a verdict and judgment against one, and in favor of the other.² And in an action against husband and wife for an assault and battery, where the evidence shows that the wife was the principal and only offender, it is clearly a case to be submitted to the jury. The presumption of coercion, which the law raises where the acts are done by the wife in the presence of the husband, is only *prima facie*, and, like other presumptions, may be repelled. And such action is joint and several in its nature, and it is entirely competent to convict the husband and acquit the wife, if she is exempt from liability by reason of the coercion of her husband, or for any other cause. And if the wife is exempt from liability, it is no ground for nonsuiting the plaintiff.³

8. Where an action is brought against husband and wife jointly, for a tort of the wife committed during coverture, she must be served with process; but, if she appears and pleads to the merits, she waives her right to except to the want of service, and will be bound by a judgment against her.⁴

9. Where an action is brought against husband and wife for a *libel* by the wife, no smaller damages are to be assessed than if the libel had been published by her while sole, and the action had been against her alone.⁵ (See i. 329, n.)

10. In a suit against the husband for cutting and carrying away timber, the wife has no right to be admitted a party, on the ground that she claims the land.⁶

11. Although a married woman is responsible for torts, and consequently for frauds, committed by her during coverture, yet it is otherwise when the fraud is directly connected

¹ *Sisco v. Cheeney*, Wright, 9.

² *Roadcap v. Sipe*, 6 Gratt. 213.

³ *Wagner v. Bill*, 19 Barb. 321.

⁴ *Smith v. Taylor*, 11 Geo. 20.

⁵ *Austin v. Wilson*, 4 Cush. 273.

⁶ *Leach v. Millard*, 9 Tex. 551.

with a contract by her, and is the means of effecting it, and parcel of the same transaction. Therefore, where a married woman, by a false and fraudulent representation that she was sole, induced a party to advance money to another, on the security of a promissory note signed by her, it was held, that no action lay against the husband and wife.¹

12. A wife cannot be made liable, in an action on the case, for the fraud of her husband, committed upon the exchange of a farm, belonging to her, for another, either on the ground of principal and agent, or of partnership.²

13. The husband of an administratrix is liable for the *devastavit* of the wife, whether committed before or during the coverture, if his liability be fixed before the death of the wife.³ But where the husband has not by his own acts made himself responsible, he is only liable for a *devastavit* of his wife, committed as administratrix before marriage, whilst the marriage subsists between them; so that his or his wife's death, before final judgment or decree, discharges his liability.⁴

14. In a suit for an injury to a married woman, by malpractice, a discharge of the cause of action, given by the husband to the defendant, is a bar to the suit, notwithstanding the previous desertion of the wife by the husband.⁵

15. In reference to the mutual rights of husband and wife, where a wife is voluntarily and without any restraint absent from her husband, a court of common law has no jurisdiction, upon his application to issue a writ of *habeas corpus* to bring up her body.⁶

16. It is held, that a husband has no right to inflict corporal punishment on his wife; but may defend himself against her, and restrain her from acts of violence towards himself or others.⁷ (a)

¹ Fairhurst v. Liverpool, &c. 26 Eng. L. & Eq. 393.

² Birdseye v. Flint, 3 Barb. 500.

³ Bobe v. Frowner, 18 Ala. 89.

⁴ Maffit v. Commonwealth, 5 Barr, 359.

⁵ Ballard v. Russell, 33 Maine, 196.

⁶ Sandilands, 12 Eng. L. & Eq. 463.

⁷ People v. Winters, 2 Parker, 10.

(a) In reference to cruelty and violence of the husband towards the wife,

17. An action lies in favor of the husband for *criminal conversation* with, or *seduction* of, his wife. And the remedy may be trespass or case.¹ The latter is now the more usual form of action.² In an old case it is laid down, that, if adultery be committed without any force, but by the wife's consent, yet the husband may bring an action on the case, wherefore the defendant ravished his wife, without laying it *per quod consortium amisit*.³ And in relation to the alternative remedies of trespass and case, it is said:⁴ "Though it is now usual and proper to declare in trespass *vi et armis* and *contra pacem* for criminal conversation, and for debauching daughters or servants; yet, as the consequent loss of society or service is the ground of action, the plaintiff is still at liberty to declare in case. When, however, the action is for an injury really committed with force, as by menacing, beating, or imprisoning wives, daughters, and servants, it is most proper to declare in trespass." Trespass "lies for criminal conversation, seducing away a wife or servant, or for debauching the latter; force being implied, and the wife and servant being considered as having no power to consent."⁵ And upon the same subject it is remarked, by another elementary writer: "The husband's remedy against the seducer of his wife may be in trespass, or by an action on the case. The latter is preferable, where there is any doubt whether the fact of adultery can be proved, and there is a ground of action for enticing away or harboring the wife without the husband's consent; because a count for the latter offence may be joined with the former; and a count in trover for wearing apparel, &c., may be added."⁶

18. Evidence must be given of *a marriage in fact*. Co-

¹ James v. Biddington, 6 C. & P. 589;
Van Vacter v. McKillip, 7 Blackf. 578.

² M'Fadzen v. Ollivant, 2 J. P. Smith,
468.

³ Rigant v. Galliard, 7 Mod. 82.

⁴ 1 Chit. Pl. 139.

⁵ Ibid. 164.

⁶ 2 Greenl. Ev. § 40, n.

as justifying a desertion of him by her, and rendering him liable for her subsequent support, see Breinig v. Meitzler, 23 Penn. 156; Eshbach v. Eshbach, 1b. 343; Harrison v. Harrison, 20 Ala. 629.

habitation, reputation, or other circumstances from which it may be inferred only, do not amount to evidence of an actual marriage.¹ But evidence of a marriage *de facto* and cohabitation, followed by proof of criminal intercourse, between the defendant and a woman who passed for the plaintiff's wife, is sufficient to go to a jury, without absolute proof of the identity of the former woman and the latter.²

19. In this action, as upon applications for divorce, where the point has most frequently been raised, direct evidence is not necessary to prove the fact of adultery. The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.³ *General cohabitation* is of itself sufficient proof.⁴ And where criminal intercourse is once proved, it will be presumed to continue while the parties remain under the same roof.⁵ So adultery may be proved, on the part of the wife, by birth of a child, the husband being out of the realm. Or, in the case of the husband, by the birth, maintenance, and acknowledgment of a child.⁶ Or by his visiting a known brothel, more especially if he remain alone for some time in the room with a prostitute.⁷

20. Upon the question of *damages*, the relation of the plaintiff to his wife, the circumstances of their domestic life, &c., may be shown. Also the relation between the plaintiff and defendant. And these facts may be proved by the conversation, correspondence, and general deportment of the parties.⁸

21. In defence of the action, it may be shown that the adultery was committed by *collusion*. So *passive sufferance* or *connivance* of the husband, though not mere negligence, inattention, confidence, or dulness of apprehension. Negligence, or loose and improper conduct of the husband,

¹ *Morris v. Miller*, 4 Burr. 2059.

² *Hemmings v. Smith*, 4 Doug. 33.

³ *Loveden v. Loveden*, 2 Hagg. Con. 2, 3.

⁴ *Cadogan v. Cadogan*, 2 Ib. 4 n.

⁵ *Turton v. Turton*, 3 Hagg. Ecc. 350.

⁶ *Richardson v. Richardson*, 1 Hagg. Ecc. 6; *D'Aguilar v. D'Aguilar*, Ib. 777, n.

⁷ *Astley v. Astley*, 1 Hagg. Ecc. 720.

⁸ 2 Greenl. Ev. § 55.

may be shown in mitigation of damages.¹ (a) But not that the plaintiff is ill-tempered, and that, previously to the illicit intercourse charged, he and his wife lived unhappily, and occasionally came to blows.² *Recrimination* or guilty conduct on the part of the husband is not a defence, though it may be shown in mitigation of damages.³

22. It was formerly held, that no action for crim. con. can be brought for any act of adultery committed after a *separation* between husband and wife.⁴ But the authority of this decision has been questioned, and it has been since decided, that, where a husband and wife entered into a deed, with a provision that in a certain event, and upon the consent of the trustees, the wife should be permitted to live separate, and she did live separate from her husband, but without the consent of the trustees, and then committed adultery; the husband might bring an action for criminal conversation against the adulterer. More especially as the deed contained a proviso, in case of such separation, for the attendance and care of the mother to her children, whereby the husband did not give up all claim to the comfort and assistance of the wife.⁵

23. In general, a husband may maintain an action for *enticing away* his wife, or inducing her to live apart from him, even against the wife's father. (b) But a father, whose daughter was married against his will, to a man who at the

¹ 2 Greenl. Ev. § 51.

² Van Vacter v. M'Killip, 7 Blackf. 578.

³ Bromley v. Wallace, 4 Esp. 237; Wyndham v. Wycombe, 1b. 16.

⁴ Weedon v. Timbrell, 5 T. R. 357.

⁵ Chambers v. Caulfield, 2 J. P. Smith, 356; 6 E. 244.

(a) Nor that the plaintiff allowed the defendant to remain in his house after a suspicion of his wife's fidelity had been intimated to him. *Foley v. Peterborough*, 4 Doug. 294.

(b) In such action, it is sufficient to state, that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion she did continue absent, &c., whereby the plaintiff lost the company and society of his wife," without setting forth the means used by the defendant. *Winsmore v. Greenbank*, Willes, 577.

time of the marriage was, and ever since had been, an habitual drunkard, whose habits of drunkenness were one ground of objection on the part of the parents to the marriage, who had been, since the marriage, in the habit of frequenting houses of ill-fame, and boasted of his intercourse with lascivious and lewd women, and who had no means of supporting a family, and was lazy, thriftless, and idle; has the right to receive her into his home, and even advise her to leave her husband, and no action can be maintained against him, under these circumstances, for enticing her away.¹ And one permitting his wife's mother to reside in his house, and affording her the rights of hospitality, although forbidden by the husband of the mother, is not liable to the action of the husband for illegally harboring his wife.²

¹ *Bennett v. Smith*, 21 Barb. 439.

² *Turner v. Estes*, 3 Mass. 317.

CHAPTER XXVIII.

PARENT AND CHILD.

- | | |
|--|---------------------------------------|
| 1. Seduction; founded on the presumption of <i>service</i> . | 7. Form of action. |
| 3. In case of children under age. | 8. Defence. |
| 4. Children of age. | 10. Damages. |
| 5. Loss of service; proof and nature of. | 12. Abduction. |
| 6. By whom the action may be brought. | 13. Other injuries to minor children. |
| | 14. Infants. |

1. CHIEF among the injuries connected with the relation of parent and child, is that of *seduction*. (a)

2. Upon this subject the rule is well established, that the father may maintain an action of seduction, when the relation of *master and servant* exists, in fact or by construction, at the time of the seduction; but not otherwise.¹ (b) And such relation must be set forth in the declaration.² But, though the daughter receive part of her wages, and is under

¹ *Mulvehall v. Milward*, 1 Kern. 343; *Ingersoll v. Jones*, 6 Barb. 661; 11 Geo. 603; 14 Ala. 235; 1 J. P. Smith, 373.

² *Lee v. Hodges*, 13 Gratt. 726.

(a) In an action for seduction, it is no ground of nonsuit, that by the plaintiff's evidence the offence was *rape* and not seduction. Whether it was so or not, is a question for the jury on the evidence. *Furman v. Aplegate*, 3 Zab. 28.

Upon the plea of not guilty, the Court are bound, if so requested, to instruct the jury, that criminal connection may take place between the parties without seduction; and that, if seduction was not proved, damages for it should not be given. *Hill v. Wilson*, 8 Blackf. 123.

(b) Where, at the time the seduction occurred, the person seduced was at service in another family, the Judge may submit to the jury to determine, whether the plaintiff was at the time entitled to the wages of the person seduced. *Ingersoll v. Jones*, 5 Barb. 661.

age, yet, if she is not the servant of the father, he cannot maintain the action.¹

3. The relation of master and servant exists *constructively* between a father and his *infant* daughter, so that he may sue for her seduction, although she is actually in the service of another, provided the father has at any time a right to reclaim her services.² Or though she has left her father's house with his consent, without intending to return, and with his license to appropriate her time and services to her own use.³ Thus the plaintiff's daughter, who had formerly been in the defendant's service, and was living with her parents, at the defendant's request, and with the consent of the plaintiff, went and resided at the defendant's house for a month, to attend to his business during the absence of his wife; and the defendant promised, before she went, to pay her something for so doing, and when she left the defendant's wife gave her eight shillings. During the time she so resided with the defendant, he seduced her. Held, the above facts were not inconsistent with the relation the daughter held, of servant to the plaintiff, and that an action for her seduction was maintainable by him.⁴ So a daughter, of the age of nineteen years, with the consent of her father, went to live with her uncle and aunt, for whom she worked when she pleased, and the uncle agreed to pay her for her work; but there was no agreement for her continuance in his house for any time. While in the house of her uncle she was seduced and got with child, and immediately after returned to her father's house, where she was maintained, and the expenses of lying-in paid by him; though she had no intention, under other circumstances, of returning to live with her father. Held, an action on the case, *per quod servitium*, &c., was maintainable by the father; he not having divested himself of the power to claim her services; and the relation of

¹ Carr v. Clarke, 2 Chit. 260; M'Daniel v. Edwards, 7 Ired. 408.

² Boyd v. Byrd, 8 Blackf. 113.

³ Bolton v. Miller, 6 Ind. 262; 14 Ala. 235; 11 Geo. 603.

⁴ Griffiths v. Teetgen, 28 Eng. L. & Eq. 371; 15 Com. B. 344.

master and servant being presumed, from his right to her service, arising from his liability to maintain and provide for her while under age.¹ But a father, who has indented his daughter to another man as a servant, being no longer entitled to her services, cannot maintain an action of seduction against him.² Nor will the action lie, where the daughter does not reside in the father's family, and has no intention of returning to it, although she is not residing as a hired servant elsewhere.³ So where a daughter, at the age of eight or nine years, left the residence of her mother, at the suggestion of friends, because the mother was a common prostitute, and went to reside in the family of the defendant, where she continued until she was seventeen or eighteen years of age, when she was seduced by him, and left the State with him, and went to Louisiana, where she was delivered of a child; and from the time she left her mother's house, there was no intercourse between the mother and daughter; and the mother continued a prostitute; held, that the mother could not maintain an action for seduction.⁴

4. A father may also maintain an action for the seduction of his daughter, whether she be over twenty-one or not, provided she be in his service at the time of her seduction.⁵ (a) As, if she be living with her father.⁶ And under his control; though there is no express contract for services between them. Such contract will be presumed from any services, however slight, rendered by her in the family.⁷ So a father may maintain trespass for the seduction of his

¹ *Martin v. Payne*, 9 Johns. 387; acc. *Dean v. Peel*, 5 E. 45; *Davies v. Williams*, 10 Ad. & Ell. N. S. 725.

² *Dain v. Wicoff*, 3 Seld. 191.

³ 1 J. P. Smith, 333.

⁴ *Roberts v. Connelly*, 14 Ala. 235.

⁵ *Kelley v. Donnelly*, 5 Md. 211.

⁶ *Booth v. Charlton*, 5 E. 47; 11 Geo. 603.

⁷ *Kendrick v. McCrary*, 11 Geo. 603.

(a) Testimony of what took place between the daughter and her seducer, after the former was twenty-three years of age, is not admissible to show loss and deprivation of society, but may be admitted to explain and illustrate what took place between the parties five years previously. *Kelley v. Donnelly*, 5 Md. 211.

daughter and servant, whom he maintains, in consideration of her services, though she be a married woman.¹ But a father cannot maintain an action of trespass, for assaulting and debauching and getting his daughter with child, *per quod*, &c., where the daughter is above the age of twenty-one years; unless she is actually in his service.² Thus the action does not lie, where the daughter was at the time of seduction in the service of another person;³ unless, during some portion of her pregnancy or lying-in, she is a member of the parent's household.⁴ Nor where a daughter lived away from her father's house, under a contract made by herself after she became of age, and received to herself the benefit.⁵

5. Upon the ground above stated, that this action is founded upon the relation of master and servant, no action will lie for debauching a daughter, though the mother maintain her and her child during her lying-in, unless on the ground of the loss of service.⁶ But a parent may maintain an action for the seduction of his daughter over twenty-one years of age, where the daughter renders services to the parent which are interrupted by the seduction; though such service be very slight.⁷ Or, if she became, in consequence, incapacitated in any material degree, for rendering any services which the plaintiff might lawfully demand of her.⁸ And though there be no express contract for services, a contract will be presumed from any services, however slight, rendered by her in the family.⁹ And the general rule is laid down, that in an action for seduction, brought by the parent, who has a right to the service of the daughter, if the seduction is proved, the loss of service will be presumed, and need not be proved.¹⁰ Especially if the daughter be a

¹ Harpur v. Luffkin, 1 Man. & Ry. 166.

² Nickleson v. Stryker, 10 Johns. 115.

³ Postlethwaite v. Parkes, 3 Burr. 1878.

⁴ Parker v. Meek, 3 Sneed, 29.

⁵ Lee v. Hodges, 13 Gratt. 726.

⁶ Satterthwaite v. Dewhurst, 4 Doug. 315.

⁷ Vossell v. Cole, 10 Mis. 634; 11 Geo. 603; 15 Barb. 279.

⁸ Knight v. Wilcox, 15 Barb. 279.

⁹ Kendrick v. McCrary, 11 Geo. 603.

¹⁰ Anderson v. Ryan, 3 Gilm. 583; Bartley v. Riehmeyer, 2 Barb. 182.

minor, residing with her father, and he has a right to claim her services.¹ Thus the action may be maintained by a step-father for the seduction of a step-daughter, who had been taken into his house, and brought up as one of his own children, and in relation to whom he had assumed the place of a father and a protector; where the female seduced was nursed and provided for, during her confinement, by the plaintiff's wife, and the expenses of her lying-in were borne by the plaintiff; although at the time of her seduction she resided in the family of another person.²

6. Any person standing *in loco parentis* to a female child during her minority, she being in his service, can maintain an action for her seduction. Thus, until a girl is eighteen, her mother, when left her natural guardian, is entitled to her services, unless the girl is apprenticed to some trade; and if before that age she be debauched, the mother may maintain an action against her seducer, if the girl was in her service at the time. But a mother is not entitled to the services of her daughter after she is eighteen years of age, nor can she maintain an action for her seduction after that age, unless in her employ. Otherwise if induced to leave her before she is eighteen, and then seduced.³ Nor can a mother maintain an action for the seduction of her daughter in the lifetime of the father, although the child was not born till afterwards.⁴ Nor can an action be maintained by a mother, after the death of her husband, for the seduction of her daughter in his lifetime, where, at the time of the seduction, the daughter was over twenty-one years of age, and was residing with her brother at his residence, and taking charge of his family; although she shortly afterwards returned to her mother's house and remained there till after her confinement, and was taken care of by her.⁵ And the executors and administrators of a deceased father cannot maintain an action for the seduction of his daughter in his lifetime.⁶

¹ Hewitt v. Prime, 21 Wend. 79.

² Bartley v. Riehtmyer, 2 Barb. 182.

³ Kelley v. Donnelly, 5 Md. 211.

⁴ Vossell v. Cole, 10 Mis. 634.

⁵ George v. Van Horn, 9 Barb. 523.

⁶ Ibid.

7. With regard to the form of action for this injury, it is sometimes held, that an action for debauching the plaintiff's daughter, *per quod servitium amisit*, is an action of *trespass*; and therefore a count thereon may be joined with a count for breaking and entering the house.¹ But an action on the case always lies by a master for the seduction of his servant, even where by the proof trespass could in the particular case have been sustained.² Though such action is not maintainable, unless laid with a *per quod servitium amisit*.³ This is the gist of the action. And the distinction is made, that this action may be maintained by the party on whom such damages have fallen. Therefore, where a party seduced lived with her father at the time of seduction, but after his death lived with her mother, by whom the trouble and expense of her lying-in was sustained; it was held, that the latter might maintain this action. It would be otherwise with the action of trespass *vi et armis*, the gist of which being the illegal entry, it could only be maintained by the father.⁴

8. It is a good defence to an action by a father for the seduction of his daughter, that his own misconduct, by way of connivance, coöperated with the defendant's to produce the wrong.⁵

9. But it is not competent for the defendant to show, that the daughter consented willingly to the seduction, or even that she in fact seduced the defendant, her consent not depriving the plaintiff of his right of action.⁶ A subsequent marriage between the seducer and seduced, and an acquittal of the former on an indictment for seduction, do not, either alone or together, constitute a complete bar to the father's right to recover, but they go to mitigate the damages.⁷

10. It is held that the plaintiff, to show the nature of the

¹ Woodward v. Walton, 2 New R. 476.

² Farmer v. Applegate, 3 Zab. 28.

³ Satterthwaite v. Duerst, 5 E. 47, n.

⁴ Parker v. Meek, 3 Sneed, 29.

⁵ Travis v. Barger, 24 Barb. 614; Voasel v. Cole, 10 Mis. 634.

⁶ M'Aulay v. Birkhead, 13 Ired. 28.

⁷ Eichar v. Kistler, 14 Penn. 282.

injury and increase the damages, may prove that the defendant promised to marry the daughter, and by that means had succeeded in debauching her.¹ But the jury must not award to the father any part of the damages which belong to the daughter, by reason of the breach of contract of marriage.² And the distinction has been made, that the plaintiff cannot give evidence of such promise. Although he may prove, in showing the circumstances under which the seduction took place, that the defendant addressed her with honorable proposals.³

11. *Exemplary damages*, beyond the mere loss of service and payment of necessary expenses, may always be allowed in actions on the case for seduction; whether the suit be brought by a parent or other person suing as master.⁴ As in case of an *adopted* daughter.⁵ Pregnancy and the birth of a child are not essential, and it is sufficient if the illness of the daughter, whereby she was unable to labor, was produced by shame for the seduction, and would not have occurred but for shame caused by the exposure; and the jury in assessing damages may take into view the wounded feelings of the plaintiff, and not only recompense him but punish the defendant according to the aggravation of the offence.⁶ They may award him compensation for the destruction of his domestic peace as well as the disgrace cast upon his family.⁷ Or for all that he can feel from the nature of the injury.⁸ And a plaintiff may show in aggravation of damages any circumstances, the natural consequences of the principal act, although they did not transpire until after suit brought.⁹ So in trespass for debauching the plaintiff's daughter, the standing of the plaintiff's family may be given in evidence.¹⁰ So it is held, that he may prove the character

¹ *White v. Campbell*, 13 Gratt. 573; 20 Penn. 354.

² *Phealing v. Kenderdine*, 20 Penn. 354.

³ *Brownell v. McEwen*, 5 Denio, 367.

⁴ *Ingersoll v. Jones*, 5 Barb. 661; *Irwin v. Dearman*, 11 E. 23.

⁵ 12 E. 23.

⁶ *Knight v. Wilcox*, 18 Barb. 212.

⁷ *Kendrick v. M'Crary*, 11 Geo. 603.

⁸ *Phealing v. Kenderdine*, 20 Penn. 354.

⁹ *Hewitt v. Prime*, 21 Wend. 79.

¹⁰ *Keplinger v. Sherrick*, Wright, 104.

of his own family, and the pecuniary circumstances of the defendant.¹

12. Analogous to the injury of seduction, is that of the *abduction* of a child from its parent. Thus the plaintiff had a verdict for damages, in an action of trespass *vi et armis*, for the abduction of his daughter, who was under twenty-one years of age; and, on motion in arrest of judgment, the action was held to be maintainable, although it was not laid in the declaration that thereby the plaintiff lost the services of his child, and although there was no evidence of a forcible taking.² But a father who lives apart from his wife, and suffers his son, a minor, to remain under the custody and care of the wife, to be supported and employed by her, or allows such son to go from him and employ himself as he pleases, and takes his wages, cannot maintain an action against a third person, on a declaration that the defendant enticed and carried away the son from the plaintiff's own care and custody. And where a minor thus left to the care of his mother, or thus allowed to employ himself, ships for a voyage to sea at the request of the mother, the father cannot, by forbidding the ship-owner to take the son to sea, entitle himself to maintain an action against the ship-owner on such declaration.³ Nor can a father maintain an action against one who procures the marriage of his daughter, if the daughter in good faith, and without force or imposition, enter into the marriage contract, when between twelve and fourteen years of age.⁴

13. In reference to other claims and liabilities, as well as that for seduction, the relation of parent and child, though the latter lives with, and is under the control of its father, does not necessarily constitute the relation of master and servant. Therefore it has been held, that a father cannot maintain trespass for an injury to a child only two years and a half old, "*per quod servitium amisit*;" as the child is incapable

¹ *McAnlay v. Birkhead*, 13 Ired. 28.

² *Kirkpatrick v. Lockhart*, 2 Brev. 276.

³ *Woodell v. Coggeshall*, 2 Met. 89.

⁴ *Goodwin v. Thompson*, 2 Greene, 329.

of performing acts of service.¹ But, if a legitimate infant child, a member of his father's household, and too young to be capable of rendering any service to his father, is wounded or otherwise injured, by a third person, or by a mischievous animal owned by a third person, under such circumstances as give the child himself an action against such person, for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child; he may maintain an action against such person for an indemnity.² And the owner of a dog that injures a minor child, so that the parent, by reason of such injury, loses the child's services, and is put to expense for his cure, is liable to the parent, under Rev. Sts. of Massachusetts, c. 58, § 13, for double the damages by him thus sustained.³ So a father may sue in case for an injury done to an infant child (then living with him and engaged in his service) by dogs, permitted by the defendant to run at large, after knowledge that such dogs were accustomed to bite mankind.⁴ So the father of a minor daughter, living with and performing labor for him, may, under the provisions of the Rev. Sts. of Maine, c. 26, maintain an action for damages sustained by him in the loss of her services, occasioned by an injury caused by a collision on the highway, which was owing to the defendant's negligence and misconduct, by means of which collision the daughter was thrown from her father's wagon.⁵ (a)

14. The parent of a child, expelled from a public school, cannot maintain an action against the school committee by

¹ Hall v. Hollander, 7 Dowl. & Ry. 133; 4 B. & C. 660.

² Dennis v. Clark, 2 Cush. 347; 7 Dowl. & Ry. 133.

³ M'Carthy v. Guild, 12 Met. 291.

⁴ Durden v. Barnett, 7 Ala. 169.

⁵ Kennard v. Burton, 25 Maine, 39.

(a) An action by a father against a common carrier, for damages arising from the death of his son, which was occasioned by the defendant's negligence, survives to the plaintiff's representatives; but damages are limited to the actual value of the son's services to the estate. James v. Christy, 18 Miss. 162.

whose orders it was done.¹ So the teacher of a town school is not liable to any action by a parent for refusing to instruct his children.²

15. In connection with the subject of this chapter, may be briefly stated the privileges and liabilities of *infants* in relation to torts or wrongs. (a) For these, infants are generally responsible, although they are not bound by their contracts. So for a mere *fraud*, an infant may be liable to an action.³ (b) But infancy is a good defence to an action on the case for deceit and false warranty, or false and fraudulent warranty, in the sale of goods.⁴ Nor is a defendant estopped from setting up infancy, as a defence to a contract, by his fraudulent representations that he was of full age.⁵ And it is not a legal fraud, if one repudiate an agreement made by him during infancy, and therefore not binding on him, even though he may have enjoyed the fruits of such agreement.⁶ And it seems that an action of deceit will not lie against an

¹ Donahoe v. Richards, 38 Maine, 376.

² Spear v. Cummings, 23 Pick. 224.

³ Burns v. Hill, 19 Geo. 22.

⁴ Prescott v. Norris, 32 N. H. 101; 19 Verm. 505.

⁵ Merriam v. Cunningham, 11 Cush. 40.

⁶ Burns v. Hill, 19 Geo. 22.

(a) In an action for the negligence of the defendants, severally of the ages of thirteen and sixteen, where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration, in determining the question of negligence. If the youth of a defendant would in any case be a defence to such an action, yet persons of the above ages must be considered, in the absence of proof to the contrary, as emancipated from childish instincts, and bound to exercise their rights with ordinary care. Neal v. Gillett, 23 Conn. 437.

(b) Thus an infant who fraudulently obtains goods upon credit, with an intention not to pay for them, is liable in tort to the party injured. Wallace v. Morss, 5 Hill, 391.

When property is bailed to an infant, his infancy is a protection to him for any nonfeasance, so long as he keeps within the terms of the bailment; but when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable to the same extent as if he had taken the property in the first instance without permission. Towne v. Wiley, 23 Verm. 355.

infant, for falsely affirming himself to be of age, whereby he induces another to give him credit for goods.¹ But an infant must either affirm or avoid his entire contract; and if he affirm it, after he comes of age, by bringing an action upon the notes given in consideration of the sale, he cannot, upon the ground of infancy, preclude the defendant from taking advantage of a false warranty, in any proper manner, as a defence.² So, if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterwards disaffirm it, and recover back the money or property, without restoring to the other party the consideration received from him. And where an infant has received a horse in exchange for other property, he cannot recover for the latter, upon an offer to return the horse, if he has so misused him as to materially lessen his value.³ So where a horse was purchased by a minor, who paid part of the purchase money, and gave his notes, secured by a mortgage on the horse, for the balance; held, that he could not repudiate the mortgage, and hold the horse against the mortgagee; nor could he maintain trespass against the mortgagee, or his assignee, for taking the horse, under the mortgage; as, in repudiation of the mortgage, he would nullify the sale, and therefore he could not hold the horse under it.⁴ (a)

¹ Price v. Hewett, 18 Eng. L. & Eq. 522.

² Bartholomew v. Finnemore, 17 Barb. 428.

³ Morrill v. Aden, 19 Verm. 505.

⁴ Heath v. West, 8 Fost. 101.

(a) A contract by an infant, for the sale of personal property, may be rescinded by him before he arrives at full age. After such rescinding, an action of trespass cannot be sustained against him for taking the property. But where A., in an action of trespass brought by him against B., an infant, for the taking of certain goods, of which the greater part, he claimed, were purchased by him of B., but some were purchased with the avails of goods sold, and others were originally the property of A., B. did not attempt to justify the taking of the goods upon the ground that they were originally his, and were by him sold to A., and that he had rescinded the contract, but on the ground that the goods were never sold to A., but were delivered to C., an infant son of A., to sell and account for, (A. being merely a surety

for C.,) and that, by the terms of the contract, they were to be redelivered to B., whenever he chose to demand them, and that such demand had been made, and C. had refused to deliver them; the defence proceeding, not on the ground that the contract had been rescinded, but in affirmance of it; the Court submitted the question of title in the plaintiff to the jury, and a verdict was given for him: it was held, 1. That B. had no cause of complaint, on the ground that his contract with A. had been rescinded; 2. That, if such contract had been rescinded, still the defence did not cover the whole ground, and A. was entitled to retain his verdict. *Shipman v. Horton*, 17 Conn. 481.

CHAPTER XXIX.

BAILEMENT.

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| <ol style="list-style-type: none"> 1. Bailment is a contract. 2. Various kinds of bailment. 3. <i>Deposit</i>. 4. <i>Mandate</i>. 7. <i>Commodatum</i>—loan. 8. <i>Locatus</i>—hiring. 9. <i>Warehousesmen</i>. 12. <i>Indemnifiers</i>; degree of responsibility. 14. To whom responsible: for what property, and for what time; guests and boarders. 16. Loss from a party's own negligence. 17. <i>Lien</i>. | <ol style="list-style-type: none"> 18. <i>Common Carriers</i>; who are. 24. <i>Bar-ten</i> of bread. 25. To whom liable. 27. Delivery to. 28. Delivery by. 30. Nature of a carrier's liability; exception of the act of God, &c. 35. Form of action against—owner. 36. Notice as affecting liability. 43. Custom or usage. 44. <i>Passenger-carriers</i>. 45. Liability for baggage. 47. Injury caused by the passenger's own fault. 48. <i>Ferries</i>. |
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1. **ANOTHER relation**, which gives rise to numerous and various torts, is that of *Bailment*. Bailment is a *contract*, but, as has already been explained—vol. 1, pp. 26, 28—the violation of this contract may often, at the election of the bailor, be treated as a simple wrong. It is therefore necessary to present a summary view of the subject, as falling within the plan of the present work.

2. Bailment is of various kinds, demanding different degrees of diligence, and creating a liability for different degrees of negligence, on the part of the bailee. These varieties of responsibility depend in part upon the equitable consideration, whether the bailor, or the bailee, or both, receive the benefit and profit of the bailment; and in part, upon grounds of public policy, which have always applied to certain forms of bailment a very stringent rule of care and fidelity.

3. *Depositum* is a deposit without compensation or reward.¹

¹ 1 Pars. on Con. 572.

4. A depositary is liable only for *gross negligence*; which is a question of fact for the jury.¹ (a)

5. *Mandatum* or *mandate* is a gratuitous commission, wherein the mandatary agrees to do something with or about the thing bailed.² The distinction is made, that, if one be requested to do something in relation to property, which is not delivered to him, nor any consideration paid him, although he undertakes to do it, he is not bound; but if he begin to do it, and then fail to do what he undertakes, he is liable *ex delicto*, although it has been a question much discussed, whether he is liable as upon a contract.³

6. It is the prevailing rule, that a mandatary is liable for gross negligence only,⁴ which is said to be *dolo proximus*; that is, omitting that care which even the most inattentive and thoughtless never fail to take of their own concerns; and it is a fact to be determined by the jury under all the circumstances of the case.⁵ It is sometimes held, however, that a mandatary is required to use such care as men of common sense and common prudence ordinarily take of their own affairs;⁶ and that, if he undertake the business submitted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking; and whether or not such diligence has been used, is a ques-

¹ *Doorman v. Jenkins*, 2 Ad. & Ell. 256.

² 1 Pars. on Con. 572. See *Lloyd v. Barden*, 3 Strobb. 343.

³ *Wilkinson v. Coverdale*, 1 Esp. 74; *French v. Reed*, 6 Binn. 308; 1 Pars. on Con. 581; *Thorne v. Deas*, 4 Johns. 84.

⁴ *Lampley v. Scott*, 24 Miss. 528. See *Chouteau v. Steamboat*, 20 Mis. 519; *Kemp v. Farlow*, 5 Ind. 462; *Dart v. Lowe*, 5 Ind. 131; 17 Ill. 170.

⁵ *McNabb v. Lockhart*, 18 Geo. 495. ⁶ *Skelley v. Kahn*, 17 Ill. 170.

(a) It has been sometimes laid down, that a depositary is required to take no more care of the property than he does of his own. But the later and better doctrine is, that the individual general character of the bailee is not a proper subject of inquiry. 1 Pars. on Con. 574; *The William*, 6 Rob. Adm. 316.

It is said, a depositary may maintain trover, which requires only possession; but not replevin, for which property is necessary. 1 Pars. on Con. 578.

tion for the jury.¹ So, it is said, where the work requires peculiar skill and care, a mandatary is responsible therefor.² Not, however, in general, the greatest amount of skill, but only such as is usually exercised in his profession.³

7. Another form of bailment is the *commodatum* or loan; which being a *gratuitous* bailment, the bailee is bound to take *extraordinary care*,⁴ and is responsible for injury arising from the *slightest neglect*, though not for a loss occurring wholly without his default.⁵

8. Another, and the most comprehensive and important form of bailment, is that termed *locatio* or *hiring*, for a reward or compensation. Without reference to those special kinds of hiring, which will be hereafter considered, and which, for peculiar reasons, involve the most rigid degree of responsibility; a bailee for hire is bound to use *ordinary diligence and care* in the protection of the property hired, which will vary in degree according to the nature of the property, and the circumstances in which it is placed.⁶ Ordinary diligence means that degree of care, attention, and exertion, which, under the circumstances, a man of ordinary prudence and discretion would exercise, in reference to the particular thing, were it his own; or which the generality of mankind use in keeping their own goods of the same kind.⁷ (a) There is, also, on the part of the hirer, an implied obligation, not only to use the thing hired with due care and moderation, but also not to apply it to any other use, or detain it beyond

¹ Kirtland v. Montgomery, 1 Swan, 452.

² 1 Pars. on Con. 588.

³ *Ib.* 589, n.; Percy v. Millandon, 20 Mart. 75.

⁴ Phillips v. Coudon, 14 Ill. 84; Scranton v. Baxter, 4 Sandf. 5.

⁵ Wood v. McClure, 7 Ind. 155.

⁶ Swigert v. Graham, 7 B. Mon. 661.

See Logan v. Matthews, 6 Barr. 417;

Runyan v. Caldwell, 7 Humph. 134;

Dudgeon v. Teass, 9 Mis. 867.

⁷ Mayor, &c. v. Howard, 6 Geo. 213.

(a) A *bailor*, who knows the use for which property is bailed, engages that it is suitable to the use for which it is hired, and authorizes the use of it in the ordinary manner, unless there should be some special reasons known to the bailee why it should not be so used. 7 B. Mon. 661.

the time for which it was hired. Otherwise, he is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.¹ So it is the duty of a bailee for hire, if the property be *stolen* from him, to show that he used due and reasonable care of the property.² (a)

9. *Warehousemen* come under this head of bailment.³

10. Where property, deposited with a warehouseman, is delivered to some person other than the owner, by the mistake or negligence of the bailee, this is, in law, a *conversion* by the bailee, at least after demand.⁴ Thus, in an action against a railroad company, as warehousemen, for a failure to deliver property received by them, the Judge instructed the jury, among other things, "that if the property was taken by mistake from the defendants' depôt, and they exercised ordinary care in the matter, they would not be liable; but if the defendants' agent delivered it by mistake to a wrong person, they would be answerable." Held, such instructions, taken together, were no cause for a new trial.⁵ So a roll of carpeting was delivered to the defendant, a storage and forwarding merchant, at his store, on the Erie canal, to be forwarded as directed, in the usual course of business; the charges to be paid at the end of the route. The defendant

¹ 6 Geo. 213.

⁴ Willard v. Bridge, 4 Barb. 361.

² Brown v. Waterman, 10 Cush. 177.

⁵ Lichtenhein v. Boston, &c. 11 Cush.

³ See Quiggin v. Duff, 1 M. & W. 70.
174.

(a) One who has a boat in possession for repairs is answerable for damages sustained by ice, if he launch her carelessly at a time when danger from such a source might easily have been foreseen. *Smith v. Meegan*, 22 Mis. 150.

But an agreement of a bailee for hire to return the chattel in good order is excused, if, without fault of his, it is destroyed by an *irresistible force*; as where a barge was destroyed by ice on the Mississippi. *M'Evers v. Sangamon*, 22 Mis. 187.

An agister of cattle is responsible for their loss, only upon proof of want of ordinary care and diligence. *Rey v. Toney*, 24 Mis. 600.

omitted to take a receipt, or make a memorandum of the transaction, and failed, when requested, to give any account of the property; which was never received by the owner. Held, the defendant was liable.¹ (a)

11. But want of ordinary care in one particular, on the part of a warehouseman, does not render him responsible for a loss occasioned by other and independent causes.² The law does not require a warehouseman to construct his buildings secure from all possible contingencies; but only that they be reasonably and ordinarily safe against ordinary and common occurrences.³ Nor does an agreement to store cotton, in a fire-proof warehouse, devolve on the warehouseman the necessity of providing water and buckets for the extinguishment of fire, there being no such terms in the contract, or custom among warehousemen.⁴ And a warehouseman, who fails to deliver property bailed to him, is bound to show only that the loss occurred without a want of ordinary care or diligence on his part; not necessarily the precise manner in which the loss occurred.⁵

¹ *Bush v. Miller*, 13 Barb. 481.

² *Gibson v. Hatchett*, 24 Ala. 201.

³ *Cowles v. Pointer*, 26 Miss. 253.

⁴ *Jones v. Hatchett*, 14 Ala. 743.

⁵ *Lichtenhein v. Boston*, &c. 11 Cush. 70.

(a) In an action against warehousemen for the non-delivery of property bailed to them, the defence was, that the property had been fraudulently taken from their custody, without any negligence on their part, and the plaintiff did not claim that the property had been in fact delivered to any person. Held, the plaintiff could not give evidence of a usage among warehousemen, of taking receipts from persons to whom property was delivered. *Lichtenhein v. Boston*, &c. 11 Cush. 70.

In case of a regular deposit of wheat with a warehouseman, which requires of the depositary due diligence in the care of the property, and that he should redeliver it to the owner or to his order on demand, on being paid a reasonable compensation for his services; the warehouseman would be liable to the depositor for the value of the wheat, in case he mixes it with other wheat in his warehouse, and ships the same for sale on his own account, notwithstanding he may supply the place of the depositor's wheat by other wheat procured and deposited in the warehouse; and the wheat supplied to take the place of the depositor's wheat will not protect the warehouseman from liability to the owner. *Chase v. Washburn*, 1 Ohio, 244.

12. Another class of bailees consists of *innkeepers*. An innkeeper is bound to keep the goods of his guest, so that they shall be actually safe, except against inevitable accidents, and the acts of public enemies, and of the owners and their servants. He is responsible for well and safe keeping; and proof that there was no negligence in himself or servants is not sufficient for his immunity.¹ In other words, an innkeeper is liable for damage happening in his inn to the goods of his guest, unless it is caused by the act of God, or the public enemy, or by the fault, direct or implied, of the guest.² As for goods lost or stolen out of his inn.³ And an innkeeper is responsible for property of a guest left in the inn, though not placed in the special keeping of the innkeeper.⁴ So his responsibility for the property extends to every part of his house into which it is usual for such property to be taken; unless there was a different understanding between him and his guest.⁵ (a)

¹ *Shaw v. Berry*, 31 Maine, 478.

² *Sibley v. Aldrich*, 33 N. H. 553;
Mason v. Thompson, 9 Pick. 280.

³ *Clute v. Wiggins*, 14 Johns. 175.

⁴ *McDonald v. Edgerton*, 5 Barb. 560.

⁵ *Epps v. Hinds*, 27 Miss. 657.

(a) An admission by an innkeeper, that he left money, entrusted to him for the purpose of taking up a bill, in his cash-box in his taproom, where it was lost, together with a much larger sum of his own; is evidence of gross negligence. *Doorman v. Jenkins*, 4 Nev. & Man. 170.

Though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels; still he is liable to make good the loss, if the owner stop as a guest, and the goods be stolen during his stay. *Ben-net v. Mellor*, 5 T. R. 273.

The liability of an innkeeper extends to all the movable goods and money of the guest, which are placed within the inn, and is not restricted to such things and sums only as are necessary and designed for the ordinary travelling expenses of the guest. *Berkshire, &c. v. Proctor*, 7 Cush. 417.

An action brought against an innkeeper, for the loss of goods entrusted to him by a guest, who is a servant of the owner, may be brought in the name of the owner. And one who hires the goods is for this purpose the servant of the owner. *Mason v. Thompson*, 9 Pick. 280.

So if the agent of a corporation, engaged in their business, becomes the guest of an innkeeper, and is robbed of money delivered to him by his

13. In conformity with this principle of liability, where the property of a guest is lost or injured, the burden of proof is on the innkeeper, to show that it occurred without his fault.¹ So, if the property of a guest is lost by a burglarious entry of an inn, under circumstances that excuse the innkeeper from all negligence, still he is not exonerated upon presumption merely, without proof of some of the circumstances.² But an action cannot be sustained for property lost by fire, through inevitable casualty or superior force, and without any negligence on the part of the innkeeper or his servants.³ And the *prima facie* presumption, that a loss or damage was occasioned by the negligence of the innkeeper or his servants, may be rebutted; and, if the jury find in favor of the innkeeper as to the negligence, he will prevail on a plea of *not guilty*.⁴ (a)

14. Although an innkeeper is the *insurer* of the goods of his *guest*, yet he is only liable for goods brought into his house by parties in the character of guests.⁵ An innkeeper is said to be one who receives as guests all who choose to visit his house, without any previous agreement as to the time of their stay, or the terms.⁶ A person who does not hold himself out as an innkeeper, but entertains travellers occasionally for pay, is not an innkeeper, nor liable as such; and he is responsible only for negligence in respect to prop-

¹ Johnson v. Richardson, 17 Ill. 302;
5 Ad. & Ell. N. S. 164.

⁴ Dawson v. Chamney, 5 Ad. & Ell.
N. S. 164.

² McDaniels v. Robinson, 26 Verm.
316.

⁵ Mateer v. Brown, 1 Cal. 221.
⁶ Wintermute v. Clarke, 5 Sandf.

³ Merritt v. Claghorn, 23 Verm. 177. 242.

principals, to be expended in their behalf, the innkeeper is liable to the corporation. *Berkshire, &c. v. Proctor*, 7 Cush. 417.

So where a father delivered to his son, a minor, money to pay his travelling expenses on his way to college, and his expenses while there, and the son, on his way, stopped at a public inn, where the money was stolen; a suit may be brought in the father's name. *Epps v. Hinds*, 27 Miss. 657.

(a) Trover does not lie against an innkeeper, for the mere loss of a parcel left at the inn for the purpose of conveyance by a carrier. *Williams v. Gessey*, 5 Scott, 56, 57; 3 Bing. N. R. 849.

erty of travellers intrusted to his care.¹ But a hotel in a city which receives transient guests is a common inn.² And if a person puts up his horse at an inn, it makes him a guest, and the relation extends to all his goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. He need not take all his meals or lodge every night there.³ So purchasing liquor at an inn is sufficient to constitute the purchaser a guest.⁴ So, where a guest goes away for a short time, leaving his property, and intending to return, he continues a guest; and the innkeeper is liable for his property, if lost during his absence.⁵ But the liability as an innkeeper ceases, when the guest pays his bill, and leaves the house with the declared intention of not returning. If he leaves his baggage behind him, the innkeeper is no longer responsible for its safe keeping, unless it is specially committed to his charge, and then only as a common bailee.⁶ As to the distinction between a guest and a *boarder*; if a traveller who puts up at an inn, and is received there as a guest, makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder.⁷ But an innkeeper is not liable for the clothing of a boarder, which may be stolen from the boarder's room, without the innkeeper's fault, although he would be for that of a guest.⁸ (a)

¹ Lyon v. Smith, 1 Morris, 184.

² Taylor v. Monnot, 4 Duer, 116.

³ McDaniels v. Robinson, 26 Verm. 316.

⁴ 5 Barb. 560.

⁵ M'Donald v. Edgerton, 5 Barb. 560.

⁶ Wintermute v. Clarke, 5 Sandf. 242.

⁷ Berkshire, &c. v. Proctor, 7 Cush. 417.

⁸ Manning v. Wells, 9 Humph. 746.

(a) Declaration, that the plaintiff had become a guest in the boarding-house of the defendant, upon the terms, amongst others, that the defendant would take due and reasonable care of the goods of the plaintiff whilst they were in the house of the defendant, for hire and reward, and it then became the duty of the defendant, by herself and servants, to take such care of the plaintiff's goods whilst a guest in the defendant's house. Breach of the alleged duty, and a loss of the plaintiff's goods, by the neglect of the

15. An innkeeper's responsibility extends to the care of *animals*. If a person commits his horse to an innkeeper, to be fed, he is a guest, although he do not himself lodge or receive any refreshment at the inn.¹ So, if an innkeeper, being also a keeper of a livery-stable, receives a horse to be fed, without giving notice that he receives it as keeper of the stable, he will be answerable as innkeeper.² So, if a horse, chaise, and harness are delivered to an innkeeper, and he receives no separate compensation for keeping the chaise

¹ *Mason v. Thompson*, 9 Pick. 280.

² *Ibid.*

defendant and her servants. It appeared, that the plaintiff had been received as a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging and attendance. The plaintiff, being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar, and, whilst he was absent on the errand, a thief entered the house, and stole a box of the plaintiff's from the hall. The Judge directed the jury, that the defendant was not bound to take more care of the house, and the things in it, than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping the servant; and he left it to the jury to say, whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. Held, by the Court, that at least it was the duty of the defendant to take such care of her house, and the things of her guests in it, as every prudent householder would take. By Lord Campbell, C. J., and Coleridge, J., that she was bound not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods; and that, if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently, that the direction of the Judge was not correct. But by Wightman, J., and Erle, J., that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants; and that, if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open; and, therefore, that the direction at the trial was right. *Dansey v. Richardson*, 25 Eng. L. & Eq. 76.

and harness, he is nevertheless liable for the loss of them.¹ (a) But though an innkeeper is *prima facie* liable for animals belonging to a guest; he may discharge himself by showing proper care and attention on his part.² (b)

16. An innkeeper is not liable for the loss of goods, if the plaintiff was guilty of gross negligence.³ And it is held that gross negligence need not be shown, but only that the guest has by his own neglect or imprudence exposed his goods to peril.⁴ (c) Thus where the plaintiff had, on the even-

¹ Mason v. Thompson, 9 Pick. 280.

² Metcalf v. Hess, 14 Ill. 129.

³ Armistead v. White, 6 Eng. L. & Eq. 349.

⁴ Fowler v. Dorlon, 24 Barb. 384.

(a) An innkeeper agreed with the owner of a horse, to entertain the man having charge of him one day each week, or oftener, if he should stop there with the horse, furnish him provender, and allow him to be kept in a certain stall. None but the man having charge of the horse took care of him. The horse was injured in the stall. Held, the innkeeper was answerable. Washburn v. Jones, 14 Barb. 193.

(b) The horse of a guest in a common inn was stabled with another horse, and kicked and injured by it. Held, though these facts raised a presumption of negligence, the innkeeper might in defence show due care. Dawson v. Chamney, 1 Dav. & Mer. 348.

The defendant, an innkeeper, took the plaintiff's horse to keep. The plaintiff rode out the horse one evening, and, on returning to the stable, tied him to the stall where he had been previously kept. The next morning the horse was found dead in the same stall, with his head fast in the trough. The trough was made of a hollow beach log, having a bulge in the middle which rendered that part of the trough wider than it was at the top. The horse had got his head fast in the trough by the jaws, and, as the witnesses supposed, had killed himself in the attempt to draw it out. Held, the plaintiff was not entitled to recover. Thickett v. Howard, 8 Blackf. 535.

In case against an innkeeper, to recover the value of a horse choked to death by his halter in the defendant's stable; the defendant proved, that the horse had been secured in the stall under the superintendence and direction of the plaintiff; and in reply the plaintiff proved the very bad condition of the stall. Held, the defendant was not entitled to rejoin, in evidence. Jordan v. Boone, 5 Rich. 528.

(c) Action for loss of a watch and money. It was proved, that the guest showed his money openly in the commercial room, went to bed, and slept

ing of the night in which the theft was committed, and on several previous occasions, opened his driving box, and counted the bank-notes kept in it, in the presence of persons in the commercial room; and the box was so insecurely fastened that it might be opened without a key; held, the jury were warranted in finding the plaintiff guilty of gross negligence; though it was the custom of travellers to leave their driving boxes in the commercial room during the night.¹ So, in an action against an innkeeper for money contained in a valise; if, in concealing the fact that the valise contained money, and treating it as mere baggage, the plaintiff was guilty of gross negligence; the defendant is not liable.² So, if a boarder at a hotel fails to take such care of his watch as a person of ordinary prudence should take,

¹ 6 Eng. L. & Eq. 349.

² *Fowler v. Dorlon*, 24 Barb. 384.

with his bedroom door open, so that a person outside could see his watch and money on the table. Late at night, a servant of the defendant, whose duty it was to sit up all night and attend to the outer door of the inn, let in a stranger, who, two hours afterwards, secretly left the inn, having stolen the watch and money. The Judge left it to the jury, to say "whether the plaintiff had been guilty of gross negligence, telling them that if he had, the defendant was entitled to their verdict; but if they did not think the conduct of the plaintiff amounted to gross negligence, he was entitled to their verdict." Verdict for the plaintiff. Held, the direction was wrong; and that the goods remained under the charge of the innkeeper, and under the protection of the inn, so as to make him liable as for breach of duty, unless the negligence of the guest occasioned the loss, in such a way as that it would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances. *Cashill v. Wright*, 37 Eng. L. & Eq. 175.

But travellers are not bound to deposit their money in a safe at an inn, although they may know one is provided for that purpose. *Johnson v. Richardson*, 17 Ill. 302.

So, where a traveller directed that his trunk, which contained money, should be carried to the room into which the innkeeper had shown him to sleep for the night, and in the night the trunk was broken open and the money stolen; held, the traveller having only conformed to the general custom, the innkeeper was liable. *Epps v. Hinds*, 27 Miss. 657.

the landlord will not be responsible for its loss.¹ So an innkeeper is not answerable for the goods of his guest, which are lost, through the negligence of the guest, out of a private room in the inn, chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the time informed the guest that there was a key, and that he might lock the door, which he neglected to do.²

17. It is held, that an innkeeper may detain a horse brought by his guest, for his keep, against the owner of the horse; and need not show that he received him of a guest.³ So an innkeeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily travel with.⁴ (a) But where several persons travel together and put up together at an inn, the goods of one cannot be detained for the board of all.⁵ (b) And an innkeeper cannot detain the goods of a boarder.⁶ (c)

¹ Chamberlain v. Masterson, 26 Ala. 371.

² Burgess v. Clements, 4 M. & S. 306.

³ York v. Greenough, 2 Ld. Ray, 867.

⁴ Snead v. Watkins, 37 Eng. L. & Eq. 384.

⁵ Clayton v. Butterfield, 10 Rich. Law, 300.

⁶ Ewart v. Stark, 8 Ib. 423.

(a) A., who had formerly been clerk to the plaintiff, an attorney, was subpoenaed as a witness in an action brought by the plaintiff for a bill of costs. A. put up at a public house, kept by the defendant, bringing with him a bag, containing, amongst other things, a letter-book belonging to the plaintiff, and quitted without paying his bill, leaving the bag behind him. Held, the defendant had a lien upon the property. 37 Eng. L. & Eq. 384; 19 Com. B. 267.

(b) A father and his two daughters put up at an inn. The board of all was charged to the father, and he was sued for it, and, being held to bail, took the benefit of the insolvent debtor's act. Held, the landlord had no lien on the trunk of one of the daughters and its contents for the whole board due to him. 10 Rich. 300.

(c) It is held, that a *livery-stable keeper* has no lien, either for the keep of a horse standing at livery, or for money paid by him, at the request of the owner, for the attendance of a veterinary surgeon upon the horse. Orchard v. Rackstraw, 9 Com. B. 698.

18. Another form of bailment is that termed *locatio operis mercium vehendarum*; involving the important subject of the rights, duties, and liabilities of *common carriers*. To make a person a common carrier, he must exercise the business as a public employment for hire, not as a casual occupation, *pro hac vice*; he must undertake to carry goods for persons generally.¹ A person whose business is not the carrying of goods, and who does not hold himself out to the world as such, will not be regarded as a common carrier, although he may occasionally carry goods for hire; and, in case of loss, will be responsible only as an ordinary bailee.² But, it is held, if one contracts specially to carry goods to a particular place, and deliver them in "good order and condition, unavoidable accidents only excepted," he is liable as a common carrier, although not one. And even though not to be paid therefor.³ And where persons receive goods as carriers, and give a receipt and bill of lading, it is not competent for them to show, by parol testimony, that they are not common carriers, for the entire distance stated in the bill of lading.⁴ And one, who holds himself forth to the public to carry for hire, is a common carrier as much in his first trip as in his second, third, or fourth.⁵ (a) So a common carrier, from a

¹ Fish v. Chapman, 2 Kelly, 349; Gisbourn v. Hurst, 1 Salk. 250; Russell v. Livingston, 19 Barb. 346. See Mershon v. Hohensack, 2 N. J. 372; Campbell v. Perkins, 4 Seld. 430.

² Samms v. Stewart, 20 Ohio, 69.

³ Coggs v. Bernard, 2 Ld. Ray. 909;

1 Com. 133; 2 Kelly, 349.

⁴ Chouteaux v. Leech, 18 Penn. 224.

⁵ Fuller v. Bradley, 25 Penn. 120.

(a) The defendants, whose usual business was farming, during the season of hauling, employed a team in transporting goods between two places. The plaintiff delivered to them a quantity of cotton to be transported; and, while on the way, some of the ropes broke and the bales burst, and, on one night, the wagon with the cotton was placed within fifteen feet of the camp-fire, which was renewed at midnight, but at both times there was no wind. In the morning the cotton was found to be on fire, the wind having arisen and blown the fire upon the cotton. Held, that the defendants were liable as common carriers for the loss of the cotton. *Chevallier v. Straham*, 2 Tex. 115.

place within to a place without the realm, is subject to the same liabilities as one who carries only within the realm.¹

¹ Crouch v. London, &c. 25 Eng. L. & Eq. 287.

The keeper of a public house, in the neighborhood of a railroad station, having given public notice that he would furnish a free conveyance to and from the cars to all passengers, with their baggage, travelling thereby, who should come to his house as guests, and for this purpose having employed the proprietors of certain carriages to take all such passengers, free of charge, to them, and to convey them and their baggage to his house; if a traveller by the cars, to whom this arrangement is known, employ one of the carriages thus provided to take him and his baggage to such public house, and his baggage is lost or stolen on the way, through a want of due care or skill on the part of the proprietor of the carriage or his driver; the keeper of the house will be liable therefor. *Dickinson v. Winchester*, 4 Cush. 114.

The owner of a *toll-bridge* is not a common-carrier. *Grigsby v. Chappell*, 5 Rich. 443.

Mere notice will not change a common into a private carrier. *Kimball v. Rutland*, &c. 26 Verm. 247.

It is a question of law. *Ibid.*

Where the declaration, in an action against a railroad corporation, for a personal injury to one of the plaintiffs, after stating that the defendants were the owners of a certain railroad, running through the towns of W. and P., and of certain cars for the conveyance of passengers upon that road, averred, that, on the day specified, the defendants were the owners of, and were running and propelling, upon said road, a certain train of passenger cars, for a certain reasonable reward paid to the defendants; it was held, that it sufficiently appeared from the declaration, that the defendants were common carriers; and that it was not necessary to allege, that the defendants had power by their charter to become common carriers; for they being engaged in this business, and having, in its pursuit, made a contract pertaining to it, ought not to be allowed to say to the contracting party, that they had no power to do so. *Fuller v. Nangatuck*, &c. 21 Conn. 557.

A., the keeper of a coach-office, and a part-owner in several coaches, made a contract with B., for the carriage of parcels which he was in the habit of sending from that office to various places. Held, this bound the owners of all the coaches in which A. was a part-owner; as well those who became partners after the making of the contract, as those who were so before. *Helsby v. Mears*, 5 B. & C. 504.

Hoymen, ferrymen, and masters of ships, who carry goods for hire, are common carriers. *Mors v. Sluce*, 1 Mod. 85.

19. So railroad corporations are common carriers; and very many of the cases, relating to the various points connected with this general subject, are actions brought against such corporations. It is held that they are estopped by their charters to deny this liability.¹ So the owners and master of a *ship* are liable as common carriers, except so far as their liability is limited by the bill of lading or charter-party, and by statute.² Thus the owners of a steamboat, employed in carrying goods for hire between Charleston and Columbia, in South Carolina, are common carriers.³ So the master of a steamboat, plying on a navigable river, is presumed to be a common carrier; and, in an action against him as such, the burden is on the defendant to show the contrary, although the declaration only alleges that the defendant is master of a certain steamboat, without alleging that he is a common carrier.⁴ And the owners of a steamboat are liable for bank-bills, sent in a letter, intrusted to the captain, and not delivered by him, although no compensation for carrying is agreed upon; unless the party sending the bills knew that the captain was exceeding his powers in taking them.⁵ (a) But a

¹ Parker v. Great, &c. 7 M. & Gr. 253; Jones v. Western, &c. 27 Verm. 399; Fuller v. Nangatuck, &c. 21 Conn. 570; Redf. on Railw. p. 235, § 125.

² Brown v. Clayton, 12 Geo. 564.

³ Swindler v. Hilliard, 2 Rich. 286.

⁴ Bennett v. Filyaw, 1 Branch, 403.

⁵ Chouteau v. Steamboat, &c. 11 Mis. 226.

(a) The defendants, a corporation, were common carriers upon Lake Champlain, and their charter extended to the carrying of all goods, wares, and merchandise, and "all other articles and things usually transported by water" on that lake. Bank-bills were usually carried by the water craft upon that lake, at the time the corporation received their charter and went into operation. Held, the defendant's powers, as a corporation, extended to the carrying of bank-bills, though the charter did not of necessity constitute them common carriers of bank-bills, so as to preclude them from the right of declining to carry them. And it is not necessary, in such case, to show, by positive proof, that the company consented that the captain of their boat should carry money on their account. The captain is the general agent of the owners; and *primâ facie* they are liable for all contracts for

steamboat is not liable as a common carrier, unless the car-

carrying, made by the captain or other general agent, for that purpose, within the powers of the owners themselves; and the burden rests upon them to show, that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. The mere fact, that the captain was by the company permitted to take the perquisites for carrying such parcels, will not exonerate the company. But it is not competent for the plaintiff, in order to charge the company, to prove by his agent, who delivered the package to the captain, that he intended to intrust the money to the captain in his official, and not in his private capacity,—without evidence that this was in some way made apparent at the time. *Farmers, &c. v. Champlain, &c.* 23 Verm. 186. See 16 Mis. 216.

The master of a canal boat, laden with merchandise, being in the city of New York, obtained from the defendants, who had been engaged for several years in towing vessels upon the Hudson River by means of steamboats, a permit in the following words: "Captain A., of steamboat B., take in tow for Albany canal boat C., &c., at the risk of the master and owners thereof, and collect \$30." The permit was delivered to Captain A., who accordingly took the canal boat in tow, the master and hands remaining on board in charge of the boat and her cargo; and, while proceeding up the river in the night time, she was run upon a rock, and, with her cargo, was lost. In an action for the loss, on the ground of unskilfulness or want of care in the navigation; held, whether the defendants were common carriers of the canal boat and her cargo, or not; they were liable for gross neglect. *Alexander v. Greene*, 7 Hill, 533.

The defendant contracted with the plaintiff, to forward certain goods from New York to Ohio by steam; the defendant being owner of a line of boats on the canal, though he owned none on Lake Erie. The goods were sent on the lake by a sailing vessel, and were lost. Held, the defendant was liable for the whole route as a common carrier. *Wilcox v. Parmelee*, 3 Sandf. 610.

The master of a steamboat contracted with the plaintiff, to transport merchandise from A. to B., within a reasonable time after its delivery at A. Owing to a fall of the river Missouri, the master could not navigate it with his own boat for two months, during which time merchandise was delivered at A. The river, in the meantime, was navigable by smaller boats. Held, the master was not excused for delaying to transport the merchandise, until the river was navigable by his own boat. *Collier v. Swinney*, 16 Mis. 484.

riage of the goods was undertaken for hire.¹ And the owners of a steamboat employed to tow other boats and rafts are not common carriers.²

20. A *ferryman* is a common carrier;³ if holding himself out for general employment.⁴

21. It is held, that the law of common carriers is strictly applicable to *express companies*.⁵ But, on the other hand, it is held, that expressmen, who forward goods from place to place for hire, in conveyances owned by others, are not liable as common carriers, but as bailees for hire to forward goods by the ordinary modes of conveyance, and have a legal right to define the extent of their liability.⁶ (a)

22. It is not necessary, to constitute one a common carrier, that a stipulation should be entered into as to the amount of freight. But there must be a right to compensation, though without this there may be the responsibility of a *mandatary*.⁷ Thus a hackney-coachman is not liable

¹ Chouteau v. Steamboat, &c. 16 Mis. 216.

² Leonard v. Hendrickson, 18 Penn. 40; Wells v. Steam, &c. 2 Comst. 204.

³ Smith v. Seward, 3 Barr, 342.

⁴ Wilsons v. Hamilton, 4 Ohio, 722.

⁵ Stadhecker v. Combs, 9 Rich. 193.

⁶ Hersfield v. Adams, 19 Barb. 577.

⁷ Knox v. Rives, 14 Ala. 249.

(a) Where expressmen, engaged in forwarding goods to California by others' boats and vessels, received two trunks of goods to be transported, contracting to be liable for no loss except from the fraud or gross negligence of them or their agents or servants, and the goods were injured by the sinking of a boat in the Chagres River, and examined by surveyors and sold at auction; held, the expressmen were not liable for damages previous to the sinking of the boat, and were not guilty of gross negligence in not forwarding the damaged goods to California, the captain of the boat, as common carrier, having control of the goods when in his possession; and that the expressmen were only liable for the amount the goods sold for, the advanced freight, and interest. 19 Barb. 577.

The owners of goods, delivered to an express and forwarding line, are bound by any contract in force between the forwarders and the common carriers whom they employ. They therefore cannot maintain any action against such carriers, except what could have been maintained by the forwarders. Stoddard v. Long Island, &c. 5 Sandf. 180.

for the loss of goods, for the carriage of which he is not paid.¹ (a)

23. A common carrier is required by law to perform the duty which he assumes, and is liable for any damage resulting from a refusal to perform it. He has no general right to refuse to receive a parcel tendered to him for conveyance, unless informed of the nature of its contents. Thus a railway company, acting as common carriers, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods, which in practice affects one individual only.² So it is held, in an early case, that an action lies against a common carrier for refusing to carry money, if he do not assign a particular reason for it.³ So one who holds himself out as a carrier of goods between two places, one of which is beyond the confines of England, is still subject to the common-law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to him for conveyance between those limits.⁴

¹ *Upshare v. Aidee*, 1 Com. 24.

³ 12 Mod. 3; *Lane v. Cotton*, *Ib.*

² *Crouch v. London, &c.* 25 Eng. L. 482.
& Eq. 287; 14 Com. B. 255.

⁴ 14 Com. B. 255.

(a) Gold dust was taken on board of the steamer *New World*, to be carried gratuitously from Sacramento to San Francisco, the clerk of the boat having given the owners of the dust actual notice, that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred. The gold dust was stolen from the boat, without any negligence on the part of its officers. Held, the owners were not liable. *Fay v. Steamer, &c.* 1 Cal. 348.

In an action by the consignor of goods against a carrier for non-delivery, if the plaintiff aver that the defendant undertook to deliver, &c., in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consignee is no variance; the consignor being by law liable. *Moore v. Wilson*, 1 T. R. 659. See p. 626.

The consignee of goods, who is ready to pay freight on having the goods delivered to him, may without any tender maintain trover against the carriers or their agents, who, having no legal claim on the goods for anything besides the freight, refuse to deliver them, unless a further sum is first paid. *Adams v. Clarke*, 9 Cush. 215.

24. In an action against a common carrier for loss of goods, it is necessary to prove that he was a common carrier, as well as that the goods were not delivered.¹ But proof of delivery of goods to a common carrier, and of a demand and refusal of the goods, or of such loss of goods as rendered a demand useless, throws the burden of proof on the carrier, to show that the loss of the goods happened by dangers for which he was not liable.² (a)

25. Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action for a loss against the carrier, yet if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though the goods may be the goods of the consignee. The question, whether in fact goods were delivered to the carrier at the risk of the consignor or consignee, is a question for the jury. The delivery of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee.³ Thus the traveller of M., a tradesman, residing in London, verbally

¹ Ringgold v. Haven, 1 Cal. 108.

Fin. 600; Davis v. James, 5 Burr. 2680.

² Alden v. Pearson, 3 Gray, 342.

See Green v. Clark, 5 Denio, 497; p.

³ Dunlop v. Lambert, 6 Clark & 625, n.

(a) In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby the consignor lost his goods; it is not sufficient to prove that they never reached their destination or were never accounted for. The office-keeper's duty is to deliver to a carrier, and some evidence must be given, showing specifically a breach of that duty. *Gilbart v. Dale*, 5 Ad. & Ell. 548.

But where, in case against a carrier, for the loss of goods delivered to him at Dublin, to be conveyed to Liverpool, it was objected for the defendant, that, unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void; held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered. *Sissons v. Dixon*, 5 B. & C. 758.

ordered goods for M., of the plaintiff, a manufacturer at Paisley. No order was given as to the sending the goods. The plaintiff gave them to the defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by the defendant's negligence; held, the defendant was liable to the plaintiff.¹

26. A mere *bailee* of goods may maintain an action for the loss of them against a carrier. Thus a laundress sent linen, which she had washed, to the owner, by a carrier, whom she paid. The carrier having lost it; held, that the laundress was entitled to sue the carrier for the loss.² (a)

27. In order to charge a common carrier for the loss of property, it is necessary that it should be delivered to him, or his agent, for transportation. But such delivery may be either actual or constructive. If he agree that the property may be deposited at a particular place, without any express notice to him, such deposit amounts to constructive notice, and a sufficient delivery. And such agreement may be shown, by proof of a constant practice and usage by the carrier, thus to receive property. Thus, where goods are delivered in the usual manner, for transportation by a carrier, on his private dock, used exclusively for this purpose; such delivery renders him liable for the loss of the goods, although neither he nor his agent was otherwise notified of such delivery. And where the defence is placed solely on the ground of a want of notice to him of delivery; the Court may properly rule that the delivery, if in accordance with the usage, was sufficient, without submitting to the

¹ *Coats v. Chaplin*, 3 Ad. & Ell. N. S. 483; 2 Gale & Dav. 552.

² *Freeman v. Birch*, 3 Ad. & Ell. N. S. 492, n.; *Moran v. Portland, &c.* 35 Maine, 55; 1 Nev. & M. 420.

(a) On the other hand, the special property of the carrier, as a bailee, is sufficient to sustain an action of trover brought by him against a third person. More especially, if, in consequence of non-delivery, the carrier has agreed to pay for the goods. *Maine Stage Co. v. Longley*, 2 Shep. 444.

jury the question of fact, whether such usage influenced the plaintiff in his conduct.¹ The principle is, that, if the deposit of goods in the carrier's warehouse is a mere *accessory to the carriage*, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods.² And any arrangement made between a carrier and his servant, by which the servant is to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of them, unless such arrangement is known to the owner thereof, so that he contracts exclusively with the servant.³ So, where a corporation have a general agent, employed for the purpose of receiving and transporting merchandise for hire, and held out to the world as invested with authority for this purpose; if goods are delivered to him, to be transported in the way of his duty, the corporation will be liable.⁴ But where common carriers set up to carry certain kinds of property from one given point to another, they cannot be compelled to receive such property at intermediate points; and, if an agent in their employ receives property at an intermediate point, his right so to receive it is a proper subject of inquiry in an action against his principals, for the agent's failing to deliver property so received; and it is erroneous not to admit evidence upon that point.⁵ (a) And a distinction is to be observed, between a delivery to a com-

¹ *Merriam v. Hartford, &c.* 20 Conn. 354; 23 lb. 595.

² *Clarke v. Needles*, 25 Penn. 338.

³ *Mayall v. Boston, &c.* 19 N. H. 122.

⁴ *Ibid.*

⁵ *Thurman v. Wells*, 18 Barb. 500.

(a) Suit against the S. C. Railroad Co. for cotton lost. Proof, that the cotton was delivered to an interior railroad company, terminating at the interior end of the defendant's railroad, and consigned to a firm in Charleston, but no proof that it came into the possession of the defendants, nor that the two roads were joint contractors. Held, insufficient. *S. C. Railroad Co. v. Bradford*, 10 Rich. Law. 307.

A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the por-

mon carrier, and a delivery to a party who receives the goods in some other capacity for transportation. Thus, where goods were shipped from New York to Charleston, for the plaintiffs, doing business in Columbia, South Carolina, to the care of the South Carolina Railroad Company, whose course of business it was to receive and forward goods so addressed; held, the company were not liable as common carriers, until the goods were received by them for carriage; that, as *forwarding agents*, their liability was not that of common carriers; but they would be liable for refusing to receive, unless they showed a good excuse; and, after receiving, for not taking all the care which a prudent man would take about his own business.¹

28. As a general rule, a common carrier must *deliver* the goods to the owner or consignee, personally, at the place where the transportation ends, unless in case of a special contract or an opposite usage.² More especially, if it be the general course of his trade so to do.³ (a) In pursuance of

¹ *Maybin v. Railroad Co.* 8 Rich. 240. 322; *M'Henry v. Railroad*, 4 Harring.

² *Schroder v. Hudson, &c.* 5 Duer, 448.

55. See *Price v. Powell*, 3 Comst. ³ *Golden v. Manning*, 2 W. Bl. 916.

ter in the usual receptacle, a locked box in the luggage van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed. Held, no evidence for the jury of the parcel having been stolen by a servant of the company. *Great Northern, &c. v. Rimell*, 37 Eng. L. & Eq. 245.

(a) If the plaintiff alleges that the article sent was not delivered, he must prove the allegation; but slight evidence will change the burden of proof. *Woodbury v. Frink*, 14 Ill. 279.

Where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be *non-delivery within a reasonable time*. (See p. 630, n.) And when the declaration alleges a contract to carry for hire, and the defendant's duty to be, to carry safely and deliver; and, as the breach, that a reasonable time for the delivery has elapsed, but the defendants have not delivered the goods; the plaintiff may recover, upon proof of non-delivery within a reasonable time. *Raphael v. Pickford*, 5 Man. & Gran. 551.

The carrier is bound to deliver precisely as he agrees, notwithstanding

the contract in the bill of lading, carriers must show a delivery in good order, and something more than putting goods on shore or on a wharf. There must be notice to the consignee, or some excuse for not giving it, and a reasonable time given to attend and receive the goods.¹ Thus, on landing goods, carriers by coasting vessels must give notice to the owner or to the consignee; and, if either refuses to receive them, the carrier must safely secure them.² (a) So,

¹ Scholes v. Ackerland, 15 Ill. 474.

² Crawford v. Clark, Ib. 561.

unforeseen circumstances which create a difficulty in so doing. Thus the defendant, a common carrier, received from the plaintiff a package of money, to convey from S. to P., and deliver it at the bank in P. When he arrived at P., the bank was shut. He went twice to the house of the cashier, and, not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it. The defendant then refused to be further responsible for any loss or accident. Held, not a legal excuse for non-performance of the undertaking. *Merwin v. Butler*, 17 Conn. 138.

The time of delivery is a *reasonable* time. *Nettles v. Railroad Co.* 7 Rich. 190. See p. 629, n.

If there has been delay in delivering, and if the price of the goods is the same when they are delivered as when they ought to have been delivered; the damages for delay will be the interest on the value of the goods for the period between these times. *Smith v. Whitman*, 13 Mia. 352.

The rule of law, that common carriers are bound as *insurers* for the safe delivery of goods, does not extend to the time of delivery. *Boner v. The Merchants, &c.* 1 Jones, Law, 211.

(a) Goods belonging to the plaintiffs were received by the defendants, at the city of New York, on the 14th and 15th days of August, 1848, to be carried to Albany, and there delivered to A., the agent, at Albany, of the Rochester line of canal boats. The goods were put on board a barge of the defendants, at New York, and taken to Albany, where they arrived on the morning of the 17th, and were destroyed by fire on that day, while in the possession of the defendants. A portion of them had been unloaded from the barge, and put into a float, in the Albany basin, belonging to the defendants, which was a stationary floating craft, kept for the purpose of receiving goods brought up the river, with different apartments for the different transportation lines West. It had been there for several years, and the custom was, to discharge goods brought up the rivers into it, from which the goods were reshipped into canal-boats, to be taken West, the canal-boats

if common carriers from A. to B. charge and receive, for cartage of goods, to the consignee's house at B., from a warehouse there, where they usually unload, but which does not belong to them; they must answer for the goods, if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance be known to the consignee.¹ So, when a railroad company carry goods on freight, it is their duty to give to owners and consignees actual notice of the arrival of the goods, or to show such a usage to the contrary, as warrants the presumption that contracts were made in reference to it.² And their liability as carriers continues, until the consignee has had a reasonable time to remove the property.³ (a) So a railroad company can make a valid contract for the transportation of freight beyond their own road as fixed by the charter.⁴ And they are liable, though no demand be made at the point of termination, if the goods never reached the point in question, and they had no office there,

¹ Hyde v. Trent, &c. 5 T. R. 389.

² Michigan, &c. v. Ward, 2 Mich.

³ Rome, &c. v. Sullivan, 14 Geo. 277; 538.

2 Mich. 538.

⁴ Schroeder v. Hudson, &c. 5 Duer, 55.

coming alongside, and receiving them. Held, that the defendants, having contracted to deliver the goods, &c., at Albany, continued to hold the relation of common carriers, until they were so delivered, or until a reasonable time should have elapsed after notice to the agent of their arrival, and an offer to deliver; that the defendants were not warehousemen at the time the goods were burned; that they had no right to warehouse them, unless in case of the absence of the person authorized to receive them, or of his neglect or refusal, after reasonable notice; and that the loss was not the result of inevitable accident, or the act of Providence. *Miller v. The Steam Navigation Co.* 13 Barb. 361.

(a) A provision in the charter of a railroad company, that, after certain notice to a consignee of the receipt of property, storage may be charged, and that in all cases the company shall be responsible for goods in deposit in any of their depôts awaiting delivery, as warehousemen, and not as common carriers; does not exonerate the company from liability as carriers, where such notice has not been given. The language, "awaiting delivery," applies to the goods only after notice. 2 Mich. 538.

nor any agent on whom the demand could be made.¹ So although the agent, who contracted for their transportation, had no authority to receive goods of that description for the point in question, or to make any special contract; if he was their general agent in making contracts for the reception and transportation of freight, and the plaintiff had no knowledge or notice of any limitation of his powers.² So the contract of a common carrier, who receives goods addressed to a person beyond the terminus of his route, without limiting his liability, is to deliver them, in the same condition in which they were received, to the consignee; nor is the consignor compelled to inquire, how many corporations make up the entire route, nor, having ascertained this, to determine at his peril which of these corporations has been guilty of the negligence which caused the injury.³ But the owner of goods, by waiving any of his rights touching the delivery, so far relieves the carrier from his liability.⁴ Thus, if the owner sends a servant to meet the goods, who takes charge of them, the carrier's responsibility is at an end.⁵ So, in an action against an express company, it appeared that money was delivered to the company, marked for the plaintiff's corresponding bank in New York. The money had been carried to New York, and, on its arrival at the defendant's office there, a person in the employ of the bank called for it, and it was delivered to him, he receipting for it in the book of the company. He had received and receipted, in the same way, for every package directed to the bank, and carried by the company, for that month; and, during the last six months, he had received more than half the packages for the bank; and this mode of delivery to him was adopted, at the request of the bank officers, and was for the accommodation of the bank, and not the express company; and packages so delivered had been regularly credited by the

¹ *Schroeder v. Hudson, &c.* 5 Duer, 55.

² *Ibid.*

³ *Foy v. Troy, &c.* 24 Barb. 382.

⁴ *Stone v. Waitt*, 31 Maine, 409.

⁵ *East India Co. v. Pullen*, 1 Stra. 690.

bank and no exception taken. On his way from the office to the bank, the messenger was robbed of the package, and this action was brought to recover the amount of the money contained in it. Held, the above facts were a good defence.¹

29. When common carriers have carried goods to their destination, and given notice to the consignees of their arrival, if the goods are not called for within a reasonable time, their strict liability as carriers ceases, and they retain possession as mere bailees in deposit.² And the doctrine, somewhat conflicting with that already stated, has been laid down; that a railroad company, who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods from the warehouse, but are liable as depositaries only for want of ordinary care.³ So when a common carrier, by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger, upon the wharf, the transit is ended, and his responsibility as carrier ceases, unless he have, either expressly or by fair implication, undertaken to do something more; and the question, as to the time and place when the duty of the carrier ends, is one of contract, to be determined by the jury from a consideration of all that was said by either party, at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances.⁴ So, in an action against a railroad corporation as common carriers, for the loss of goods directed to New York, a place situated beyond the terminus of such road; the declaration alleged, that the defendants were common carriers to New York. On the trial, it was admitted that the goods had been transported safely over the de-

¹ Sweet v. Barney, 24 Barb. 533.

526; Allan v. Grupper, 2 Cr. & Jerv.

² Rome, &c. v. Sullivan, 14 Geo. 277.

218; Teall v. Sears, 9 Barb. 317.

³ Thomas v. Boston, &c. 10 Met.

⁴ Farmers, &c. v. Champlain, &c. 23

472. See Rowe v. Pickford, 1 Moo. Verm. 186.

defendants' road, and deposited on board a steamboat for New York, where they were burnt. The plaintiff gave in evidence the defendants' charter, containing a permission thus to carry goods, also an advertisement, published in a newspaper, stating that freight would be billed by the defendants to New York, and evidence that the plaintiffs had been in the practice of sending freight to New York over the defendants' road from the time it went into operation, and that the defendants had made no demands of the plaintiffs for the freight of the goods, and then rested their cause. The defendants thereupon moved for a nonsuit, which was granted. Held, that such nonsuit ought not to be set aside.¹

30. A carrier, who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even though the jury find expressly that the goods were destroyed without any actual negligence in the carrier. He is liable for inevitable accident, happening through the intervention of any human means.² (a) A carrier is in the nature of an *insurer*. The obligation of a common carrier does not arise out of *contract*, in the usual sense of that expression, but it is declared by law, and his responsibilities are fixed by considerations of public policy.³ Thus a hoyman, who under-

¹ *Naugatuck, &c. v. Waterbury, &c.* *M'Henry v. Railroad*, 4 Harring. 448; 24 Conn. 468. *Laveroni v. Drury*, 16 Eng. L. & Eq.

² *Forward v. Pittard*, 1 T. R. 27; 510. *Central. &c. v. Hines*, 19 Geo. 203; ³ *Thurman v. Wells*, 18 Barb. 500. *Pendall v. Rench*, 4 M'Lean, 259;

(a) There is no difference, in point of law, between common carriers on land and common carriers by water. *King v. Shepherd*, 3 Story, 349.

Nor between a liability for *goods*, and that for *brute animals*. *Wilsons v. Hamilton*, 4 Ohio, N. S. 722.

The principle, that, where both parties are equally to blame in causing an injury, neither can recover, does not apply to a case where goods are delivered to a carrier during the peril of a storm. It is for him to decide whether they can be safely received, and if he receives them he is liable from that time. *New Brunswick Co. v. Tiers*, 4 Zab. 697.

takes to carry goods, must deliver them safe at all events, except damaged by the act of God, or by the king's enemies.¹ But a hoyman is not answerable for goods lost by the accidental oversetting of his hoy by the wind.²

31. Unavoidable accidents, or acts of God, are any accidents produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness, &c.³ But the act of God, which would excuse a common carrier, must be the *immediate*, and not the *remote*, cause of the loss.⁴ (a) It must be a *direct and violent act of nature*. Thus, where a boat upon a river is stranded upon a recently formed bar, of which the carrier was ignorant, he is liable.⁵ So, if it might not have happened but for the negligence of man, the

¹ Dale v. Hall, 1 Wils. 281.

² Amies v. Stevens, 1 Str. 127.

³ Fish v. Chapman, 2 Kelly, 349.

⁴ King v. Shepherd, 3 Story, 349;

Oakley v. Port, &c. 34 Eng. L. & Eq.

530; M'Henry v. Railroad, &c. 4 Har-
ring. 448.

⁵ Friend v. Woods, 6 Gratt. 189.

(a) But on the other hand the carrier is not liable, if his own act is not the proximate, though in part the remote cause of loss. Thus the defendants contracted to transport certain goods upon a canal. By reason of an extraordinary flood in a certain division of the canal, the boat was wrecked, and the goods greatly damaged. The boat started on its voyage with one lame horse, by reason whereof great delay was occasioned, but for which the boat would have passed the point where the accident occurred before the flood came, and have arrived safely and in time at the point of destination. Held, that the use of the lame horse was too remote a cause of the accident to render the defendants liable. *Morrison v. Davis*, 20 Penn. 171.

Where goods were placed on the main deck, between the hatches of a propeller, and were necessarily thrown overboard and lost in a tempest, by order of the master, for the preservation of the vessel, &c.; held, the owners of the vessel were not liable. *Gillett v. Ellis*, 11 Ill. 579.

In an action against a common carrier upon a bill of lading, for a failure to deliver cotton in good order, all the damage being caused by rains, a custom, known to the plaintiff, to transport cotton and other freight, between the points named in the bill of lading, in open boats, constitutes a good defence. *Chevallier v. Patton*, 10 Tex. 344.

carrier is liable. Therefore, where a violent storm causes an unusually low tide, and the carrier's barge, lying at the pier, is pierced by a projecting timber, covered at ordinary tides, and not known by the carrier to exist; he is liable, notwithstanding his leaving the barge there would not have produced the injury, without the concurrence of the act of God, and the negligence of the wharf-builder.¹ So a ship sailed from New Orleans for New York, on the 20th of June, with a cargo of tobacco in hogsheads, and lard in barrels, the hogsheads and barrels being badly stowed and coopered. When she was seventeen days out, not having met any very rough weather, lard was pumped from her, and the tobacco was damaged by the lard running into it. Held, that this damage was occasioned by other causes than the perils of the sea, and that the ship was responsible for it.² But injury to goods shipped in the hold of a vessel, resulting from an intrinsic principle of decay inherent in the goods themselves, or from the natural closeness and dampness of the hold, on a voyage delayed by boisterous weather and adverse winds, is not damage for which the carrier is responsible, who has undertaken, by a bill of lading in common form, to deliver the goods in like good order and condition as shipped, "dangers and accidents of the seas and navigation of whatsoever nature and kind excepted;" unless he might have prevented the damage by usual and proper skill, precaution, and diligence, the burden of proving which is on the owner of the goods.³

32. If a common carrier by water be prevented from delivering goods on account of the freezing up of the river, his obligation to deliver them in a reasonable time after the resumption of navigation will still continue.⁴ And it is the duty of a carrier, when goods in his care are injured, to make reasonable exertions to repair the injury or arrest its progress. Hence, if packages of fur become wet, he should

¹ New Brunswick Co. v. Tiers, 4 Zab. 697.

² The Newark, 1 Blatch. Ct. 203.

³ Clark v. Barnwell, 12 How. U. S. 272; Rich v. Lambert, Ib. 347.

⁴ Lowe v. Moss, 12 Ill. 477.

have them opened and dried.¹ Though the master of a steamboat carrying wheat, which was wet by inevitable accident, was held not liable for damages because he did not dry the wheat.² So a carrier is liable in case of loss by fire, even though originating in a building other than that where the goods are stored.³ So, if common carriers receive goods with orders to "ship immediately," which are stored in their warehouse on account of the obstruction of navigation, and there consumed by fire, they are liable for their value.⁴ So the proprietor of a steamboat is liable for cotton carried by him, which is destroyed by fire on board his boat, unless he can show a well-known, recognized, and established usage, to exempt such carriers from such liability, except where a higher rate of freight is paid; or unless a general and well-understood notice to that effect has been given by this particular carrier, so as to constitute a part of the implied contract; and even in those cases the carrier should be held to strict proof of diligence and care.⁵ So a statute, limiting the responsibility of ship-owners for a loss occasioned by fire, does not extend to the case of a fire happening on board a lighter, employed in carrying goods from the shore to be loaded on board a ship.⁶

33. A common carrier by water is liable for a loss caused to goods by unnecessary *delay and unseaworthiness* of the vessel; unless the loss would have happened without such delay and unseaworthiness.⁷ And where a cargo consisted of salt and earthen and other wares, and the latter were injured, and no evidence appeared that there had been a stress of weather or great storms during the voyage, nor of the condition of the vessel before it sailed; held, it was incumbent on the carrier to show, that the injury had happened from a cause for which he was not liable; and, as

¹ Chouteaux v. Leech, 18 Penn. 224.

⁵ Singleton v. Hilliard, 1 Strobb.

² Steamboat Lynx v. King, 12 Mis. 203.

272.

⁶ Morewood v. Pollok, 18 Eng. L. &

³ Forward v. Pittard, &c. 1 T. R. Eq. 341.

⁷ Smith v. Whitman, 13 Mis. 352.

27. ⁴ Clark v. Needles, 25 Penn. 338.

a bad condition of the vessel had been developed, and no cause shown for it, it was a presumption of fact, though not of law, that the vessel was unseaworthy when she sailed.¹ But, in an action against a carrier, on a bill of lading, for a loss of freight, although his boat was not seaworthy, it is yet competent for him to show, that the loss was in fact occasioned by the excepted perils of the river, and not by the unseaworthiness of the boat, and must have happened if that defect had not existed; though a delinquency which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurrence, which might have had an agency in producing it, will render him liable.² (a)

¹ *Cameron v. Rich*, 4 Strobb. 168.

² *Collier v. Valentine*, 11 Mis. 299.

(a) In reference to the liability of a common carrier, as affected by his contract; though the bill of lading be silent as to the matter, the law implies an exception as to losses occasioned by inevitable accident; but such implication may be repelled by parol proof, connected with advertisements and circulars, of an agreement to insure a safe delivery without any exception. *Morrison v. Davis*, 20 Penn. 171.

A common carrier, contracting to forward goods "by sail on the lake," all lake dangers being in that case taken by the owners, is liable as insurer for their loss, if sent by steam. *Merrick v. Webster*, 3 Mich. 268.

A common carrier, who receipts for goods as being "in good order and well conditioned," where the goods are closely boxed, may, in an action by the shipper for damage done to the goods, show by parol evidence that the goods were in fact damaged when they were shipped. *Gowdy v. Lyon*, 9 B. Mon. 112.

As to what constitutes positive *negligence* in a common carrier, it is held that the omission to provide bars for the open ends of a ferry boat, frequently used in transporting horses, affects the carrier with liability, for neglect, in case of loss from that cause. *Wilson v. Hamilton*, 4 Ohio, N. S. 722.

But negligence in the management of a boat is not a conclusion of law from the circumstance that a difficult place was passed by the boat in the night. *Ready v. Steamboat, &c.* 17 Mis. 461.

And the rule, which imputes carelessness to a captain, whose boat strikes a known rock or shoal, unless driven by a tempest, is only applicable to the

34. In an action against a common carrier, it is sufficient to prove that the goods were received by the carrier, and that he has failed to deliver them, according to his undertaking.¹ And if the carrier cannot show that the loss has accrued by one of the excepted perils, he is liable. Proof of negligence is unnecessary to charge him, and proof of diligence will not excuse him.² Thus a box of sovereigns was shipped, to be carried for hire from New York to Mobile, and the bill of lading only contained the usual exceptions against perils of the seas. The vessel was wrecked on the "Honda Reefs," and the captain then removed the box from the stateroom, where it could be locked up, and placed it in the run, where the crew had free access, and allowed it to remain there, without personally superintending it, while the wreckers were on board. The box was lost; and a libel was brought against the master and owners to recover its value. Held, the burden of proof was on the respondents to show, that the loss occurred by a peril of the seas; and, failing in this, they were responsible for the loss, however it occurred.³

35. A common carrier is sometimes held liable in *trover* for losing goods.⁴ (a) And he is thus liable, although he has

¹ McCall v. Brock, 5 Strobb. 119.

² King v. Shepherd, 3 Story, 349.

³ 5 Strobb. 119.

⁴ Greenfield, &c. v. Leavitt, 17 Pick. 1.

navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of the Western rivers. There, each case must be governed by its own circumstances, and be tested by the course usually pursued by skilful pilots in such cases. *Collier v. Valentine*, 11 Mis. 299.

(a) The plaintiff, having been imposed upon by a swindler, consigned a box, at Birmingham, by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there; but, upon receiving a letter signed J. West, requesting that the box might be forwarded to a public house at St. Alban's, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box. That person having disappeared, and the box having been originally obtained of the plaintiff by fraud; held, the defendants were liable to him in *trover*. Also, that it was properly left

no beneficial interest, if he misuses a chattel intrusted to him, puts it into the hands of a third person without order, or by mistake, or on a forged order.¹ So trover lies, for recovering goods of a carrier, which he has damaged, and detains for freight. And this without averring payment or tender of a reward for transportation and safe-keeping.² But the prevailing rule is, that trover will not lie against a common carrier (or a wharfinger) where the goods are stolen or lost; but the remedy must be by action on the case.³ Nor for goods lost by nonfeasance merely.⁴ (a) Nor for omitting seasonably to deliver the goods; without a previous demand.⁵ And in general it is held, that a demand is necessary, before trover will lie.⁶ (b)

¹ Trowell v. Youmans, 5 Strobb. 67.

⁴ Bowlin v. Nye, 10 Cush. 416.

² Ewerts v. Kerr, 1 Rice, 204.

⁵ Robinson v. Austin, 2 Gray, 564.

³ Ross v. Johnson, 5 Burr. 2825.

⁶ Rome, &c. v. Sullivan, 14 Geo. 277.

to the jury to say, whether the defendants had delivered the box, according to the due course of their business as carriers. *Stephenson v. Hart*, 4 Bing. 476.

(a) And instructions to a jury, that they might find a conversion, if the defendant so managed as to interfere with the rights of the plaintiff to, and control over, the property, so that the plaintiff lost the same; were held too indefinite for application by the jury, and to have a tendency to mislead them. 10 Cush. 416.

(b) Case on the custom and trover cannot be joined. *Dalston v. Janson*, 1 Ld. Raym. 58.

The following distinctions are made upon this subject:—

Trover lies against a carrier, for refusing to deliver goods given to him to carry; or an action on the case. But trover will not lie against him, for refusing to deliver goods given to his servant, unless he has been guilty of an actual conversion. *Taylor v. ———*, 2 Ld. Raym. 792.

Trover does not lie against a carrier for negligence; as for losing a box, &c. But it lies for an actual wrong; as if he break it to take out goods, or sell it. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he refused to deliver it, it is good evidence of a conversion. 2 Salk. 655.

Trover may be maintained against a common carrier, where the goods are lost by his act, though without any wrongful intent; as where he de-

36. It is a question much discussed, whether the common-law liability of a carrier may be restricted by *express notice*, relating to the conditions or the extent of such liability; either publicly advertised, or embodied in an express agreement with the party whose goods are transported. (a)

37. It is held, that where a carrier gives notice to his customers, that he will not be accountable for any parcel, &c. of more than a certain value, unless entered as such and paid for accordingly; if a parcel be sent above that value, without being entered and paid for as such, and it be lost, the owner is not entitled to recover anything. And this,

livers them to the wrong person by mistake, or under a forged order. But if the goods are lost through the mere *omission* of the carrier, trover will not lie, even after demand and refusal; but only *assumpsit* or *case*. *Hawkins v. Hoffman*, 6 Hill, 586.

(a) See *M'Andrew v. Electric*, &c. 33 Eng. L. & Eq. 180; *Hunt v. The Cleveland*, &c. 6 M'Lean, 76; *Dorr v. N. J.* &c. 4 Sandf. 136; *Farmers, &c. v. Champlain*, &c. 23 Verm. 186; *Baxendale v. Hart*, 9 Eng. L. & Eq. 505; *Moore v. Evans*, 14 Barb. 524; *Moses v. Boston*, &c. 32 N. H. 523; *Newstadt v. Adams*, 5 Duer, 43; *Kimball v. Rutland*, &c. 26 Verm. 247.

A declaration, setting out merely an ordinary engagement of a common carrier, is not supported by proof of a contract, containing a special exception of the general liability. *Davidson v. Graham*, 2 Ohio, N. S. 181.

Circumstantial evidence is competent to prove, that a clause, by which the responsibility of the carrier was limited, was left in the bill of lading by mistake. The question of mistake is for the jury, and the burden of proof is on the party who alleged it. *Chouteaux v. Leech*, 18 Penn. 224.

Where a special contract was made between a common carrier and his employer, and a loss has occurred, the burden of proof rests on the carrier, to show that the loss occurred from one of the causes excepted. *Davidson v. Graham*, 2 Ohio, N. S. 181.

A bill of lading for cotton shipped by a steamboat carrier contained the following exception,—“dangers of fire and navigation only excepted.” Another bill contained the following exception,—“unavoidable accidents of navigation and fire excepted.” The cotton was burnt on board the boat. Held, that “dangers of fire,” and “unavoidable accidents of fire,” meant the same thing, and that the term “fire” meant any fire, and was not restricted to fire originating from the furnace of the boat. *Swindler v. Hilliard*, 2 Rich. 286.

without reference to the high price which he agrees to pay for the carriage of the article; and although the carrier does not prove that the loss happened by any of those accidents, against which the law makes him an insurer. Nor is the carrier bound to prove that he used reasonable care.¹ And the same rule is held to apply to other limitations of responsibility; whether relating to the nature of the property, the mode of transportation, or the time of delivery. (a) Nor

¹ *Izett v. Mountain*, 4 E. 371; *Harris Marsh v. Horne*, 5 B. & C. 322; 2 J. v. Packwood, 3 Taunt. 264; *Stoddard P. Smith*, 107; *Bignold v. Waterhouse*, v. Long Island, &c. 5 Sandf. 180; 1 M. & S. 255.

(a) A horse was delivered to a railway company at N., to be conveyed to W. for the plaintiff. The person who delivered the horse signed a contract, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage to horses thus conveyed. The horse reached the station at W. safely, but the company's servants there either forgot or did not notice that the horse had arrived, and, on the plaintiff's calling for it the next day, it was discovered in a horse-box on a siding, and found to have sustained serious injuries from cold, and from remaining in a confined position all night. Held, the company was protected from liability, under the 17 & 18 Vict. c. 31, § 7, by the signed contract. *Wise v. Great Western*, &c. 36 Eng. L. & Eq. 574.

The plaintiff, who had cattle conveyed by railway, received for them a ticket, which he signed, containing the terms on which the company carried the cattle. At the foot of the ticket was a clause: "N. B.—This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage howsoever caused, and occurring to live stock of any description travelling upon the L. & Y. Railway, or in their vehicles." The plaintiff saw the cattle put into the truck. During the journey, some of the cattle became alarmed, broke out of the truck, and were injured. The truck was unfit and unsafe for the conveyance of cattle. Held, there was no implied stipulation that the truck should be fit for the conveyance of cattle, and the company were not liable. *Chippendale v. Lancashire*, &c. 7 Eng. L. & Eq. 395.

The defendants, being common carriers, received property of the plaintiff, at New York, for transportation to Brighton Locks, and stored it in their warehouse, at Albany, on the pier. On the same day a fire broke out in Albany, a quarter of a mile distant. It was very dry, the wind blew with great violence, and the fire spread rapidly. The defendants' ware-

will a mere declaration of the plaintiff, made at the time of delivering the goods, that he will not be bound by such notice, vary the effect of it, unless unequivocally assented to by the carrier or his authorized agent.¹ Nor will such notice be defeated, by proof that the bookkeeper, who received the goods, was conscious of or might have inferred their value.² Thus, where one delivered goods of above £5 value to common carriers to carry by the mail, paying no extra price; and by a public notice, which had before reached the owner, the carriers had declared that they would not be accountable for any package above the value of £5, unless insured and paid for accordingly; held, the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the £5.³

38. But on the other hand it has been held, that a common carrier cannot restrict his liability, as such, by a mere notice,⁴ (a) even if brought to the knowledge of the owner of the property; though his liability may be limited by ex-

¹ Walker v. York, &c. 22 Eng. L. & Eq. 315. See 2 J. P. Smith, 107.

² Levi v. Waterhouse, 1 Price, 280.

³ Nicholson v. Willan, 5 E. 507; 2 J. P. Smith, 107.

⁴ Fish v. Chapman, 2 Kelly, 349. See Hart v. Baxendale, 6 Eng. L. & Eq. 468.

house, and other warehouses on the pier, were consumed, and a portion of the property received of the plaintiff for transportation. When the goods were received at New York, the defendants gave a receipt, or shipping bill, by which they agreed to transport the goods to Brighton Locks, "the danger of the lakes, of fire, and the acts of Providence excepted." Held, though the loss was not the result of inevitable accident, or the act of Providence, the defendants had a right to limit their liability, and, having expressly excepted the risk of fire, were not liable. *Parsons v. Monteath*, 13 Barb. 358.

(a) The prevailing rule is, that a common carrier can only *limit*, but not wholly *avoid* his common-law liability, by means of a public notice. 1 *Parson Cont.* 708, and n.; 2 *Greenl. Ev.* § 215.

press agreement.¹ And it has been held that the charter of a railroad is in the nature of a contract between the company and the state, permanently binding upon each; and the principal engagement on the part of the company is, that they shall become and continue to remain *common carriers*. Their liability as common carriers, consequent upon the contract, and the law appertaining thereto, becomes irrevocably fixed. They cannot alter or modify this liability by any stipulation or contract.²

39. With regard to the general right of a carrier to be informed of the nature and value of the property intrusted to him; it is held, that a person delivering property, which requires peculiar care and attention for its safe transportation, to a common carrier, should make known to him the necessity, in order that proper precaution may be used;³ that he may require the value of the goods to be made known to him, and may take advantage of fraudulent acts of his employers.⁴ Thus if a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other answers in the negative; or if he accepts it conditionally, provided there is no money in it; the carrier is not liable.⁵ So where the price of the carriage of money is greater than that of other goods, and the carrier is paid only for common goods, and is ignorant that the parcel contains money, he is not liable.⁶ So it is held, that the reward ought to bear proportion to the risk. If money or jewels are sent, denying or concealing that it is money or jewels, the carrier is not answerable.⁷ But on the other hand it is held, that, if A. inclose money in a parcel of goods belonging to B., and B. send the parcel to C., a common carrier, and the parcel is lost, A. may maintain an action against C. for the money, although he

¹ *Dorr v. The New Jersey, &c.* 1 Kern. 485.

² *Michigan, &c. v. Ward*, 2 Mich. 538.

³ *Wilsons v. Hamilton*, 4 Ohio, N. S. 722.

⁴ *Fish v. Chapman*, 2 Kelly, 349.

⁵ *Titchburne v. White*, 1 Str. 145.

⁶ *Ibid.* (note.)

⁷ *Gibbon v. Paynton*, 5 Burr. 2298.

did not tell the carrier that money was contained in the parcel, and although he only received the rate of carriage for goods.¹ So, to an action against the defendants, as common carriers, for refusing to carry a package of the plaintiff, the defendants pleaded, that, when the package was tendered, they requested the plaintiff to inform them of its contents, and that the plaintiff refused to do so; wherefore, and because the defendants did not know what the package contained, they refused to receive and carry it. Held, a bad plea; for a carrier has no general right, in every case, and under all circumstances, to be informed of the contents of packages tendered to him to be carried.²

40. A special agreement, limiting the liability of common carriers, though general in its terms, does not release the carriers from losses resulting from negligence or fraud.³ Thus a carrier had given notice, that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, having notice, delivered a parcel, containing bank-notes to a large amount, without informing the carrier of its contents. The coach was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it; and during this time the parcel was stolen. Held, the two questions were properly left to the jury; first, whether the plaintiffs had been guilty of any unfair concealment; and, secondly, whether the carrier had been guilty of gross negligence.⁴ So the plaintiffs sent goods packed in a box by the defendant's wagon. The box was placed with its lid outwards, at the tail of the wagon, which was left, during several hours in the night, standing in a road opposite an inn, where the wagoner stopped, without any person to

¹ *Drinkwater v. Quenell*, 7 Mod. Penn. 526; *Birkett v. Willan*, 2 B. & Ald. 356; *Macklin v. Waterhouse*, 2

² *Crouch v. London, &c. Railway Co.* 25 Eng. L. & Eq. 287. Moo. & P. 319; *Duff v. Budd*, 3 Brod. & B. 177; *Davidson v. Graham*, 2

³ *Stoddard v. Long Island, &c.* 5 Ohio (N. S.) 131.

⁴ *Batson v. Donovan*, 4 B. & Ald. 21. Sandf. 180; *Beck v. Evans*, 16 E. 244; *Pennsylvania, &c. v. M'Closkey*, 23

watch it. The box was forced open and its contents abstracted. A notice was proved, limiting the carrier's responsibility to £5. Held, the carrier was guilty of gross negligence in leaving the wagon so exposed, and consequently liable for the loss.¹ So, in an action against a coach-proprietor, for the loss of a trunk containing wearing apparel and jewels, the value of which was not disclosed by the plaintiff, nor asked by the defendant, the jury were directed to consider whether the defendant had been guilty of gross negligence, without reference to the non-disclosure of the value of the article. The jury having found for the plaintiff, the Court refused to set aside the verdict.² So an exception of "the dangers of the lake," in a contract to convey goods from New York to Ogdensburg, does not exempt the carrier from liability for loss happening through want of ordinary care.³ So, where a common carrier stated, in his bill of lading, that he would not be liable for breakages of goods in boxes; held, he was liable for such breakages caused by the negligence of his servants.⁴ So where a valuable bank-parcel, sent by a stage-coach, is lost, and it is proved, that, on arrival of the coach, the driver was in liquor, and that the bookkeeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it; held, a loss arising from gross negligence, and that the proprietors were liable, notwithstanding the usual notice.⁵ So a common carrier by water gave notice, that "he would not be responsible for any loss or damage to any cargo put on board his vessels, unless it happened by want of ordinary care and diligence in the master or crew, and then only to £10 per cent. on the amount of the loss, and not beyond the value of the vessel and the amount of her freight; and that, if any person desired to have goods car-

¹ Langley v. Brown, 1 Moo. & P. 583.

² Brooke v. Pickwick, 12 Moore, 447. See Bowdenham v. Bennett, 4 Price, 31; Lowe v. Booth, 13 lb. 329.

³ Slocum v. Fairchild, 7 Hill, 392.

⁴ Reno v. Hogan, 12 B. Mon. 63.

⁵ Bodenham v. Bennett, 4 Price, 31.

ried free of any risk, in respect of loss or damage, whether by the act of God or otherwise, they must make a special agreement on payment of extra freight." Held, the carrier was answerable for the whole of any loss or damage arising by his own default; as in case the vessel, at the time of loading, were leaky and not seaworthy; that the notice applied only to losses by reason of *the default of others*, not of himself.¹ So a parcel, which, with its contents, exceeded £5 in value, having been delivered to A. and B., common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which A. was one of the proprietors, but in which B. had no concern; and the parcel was lost. The carriers had previously given the customary notice. Held, they were responsible.² So a parcel containing country banker's notes, of the value of £1300, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above £5 in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, held, notwithstanding, that the carrier was responsible for the loss.³

¹ *Lyon v. Mells*, 1 J. P. Smith, 478. (a)

² *Garnett v. Willan*, 5 B. & Ald. 53.

³ *Sleat v. Fagg*, 5 B. & Ald. 342.

(a) In the same case, elsewhere reported, it is held, that a carrier by water, contracting to carry goods for hire, impliedly promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay ten per cent. upon such damage, so as the whole did not

41. A carrier's notice, limiting his liability, is not available, if it appears that it did not come to the knowledge of

exceed the value of the vessel and freight." For a loss happening by the personal default of the carrier himself, (such as not providing a sufficient vessel,) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself, by a special acceptance, from the responsibility cast upon him by the common law, for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon v. Mells*, 5 E. 428.

In August, 1839, A., an express carrier, entered into a contract under seal with the defendants, proprietors of a line of steamboats running between New York and Stonington, by which, for a certain sum per month, during the year 1839, A. was to have the privilege of transporting a crate of a specified size, ("contents unknown,") on the boats; the crate and contents at all times to be at the risk of A., and the proprietors not in any event to be responsible either to A. or his employers for the loss of any goods, &c., transported by A.; and A. to annex to his advertisements and receipts the following, viz: "Take notice: A. is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to its contents at any time;" which clause was so annexed by A. This contract, having expired, was resumed for one year by parol agreement. The company gave notice by public advertisement, that all goods, specie, &c., shipped on their steamers, must be at the risk of the owners, and inserted in their bills of lading an exception from their liability for the danger of fire, water, &c., and a special notice that the company were to be held responsible for ordinary care and diligence only. In January, 1840, A. received from a bank in Boston checks and drafts on New York, on which he was to collect the specie in New York, and transmit the proceeds to Boston. On the 13th of January, A. shipped in his crate, on board the *Lexington*, one of the company's boats, a large amount of specie for the Boston bank. The boat was destroyed by fire on the passage, and the money lost. The bank filed a libel in admiralty against the defendants, to recover their money. It appeared, that one hundred and fifty bales of cotton were stowed on and along the boiler deck and around the steam chimney, within about one foot of the casing of the same, which was of pine, and within a few inches of the pipe, the cotton extending from the boiler to within a foot of the upper deck; that the fire was discovered soon after it broke out, and probably might have been extinguished with a few buckets of water had the boat

the customer.¹ And it is held that a mere general notice, when brought to the knowledge of the owner of the goods, will not avail, unless there is very clear proof that the owner expressly assented to it, as forming the basis of the contract; though a carrier may, by general notice, brought to the

¹ *Kerr v. Willan*, 6 M. & S. 150. See *Riley v. Horn*, 5 Bing. 217; 2 Moo. & P. 331; *Camden, &c. v. Baldarf*, 16 Penn. 67.

then been stopped; instead of which the wheel was put hard a-port, in doing which the wheel-rope parted, and all control of the boat was lost; that the fire-engine on board, and the hose belonging to it, were stowed in different places in the boat, by reason of which it could not be brought into play; and that only two or three buckets could be found, and only one fitted with a heaving line, the specie boxes being emptied and used to carry water. By act of Congress, (5 Sta. at Large, 306,) such boat was required to be furnished with suction-hose and fire-engine, in good order, on every trip, and also with iron rods or chains instead of tiller ropes. Held, the respondents were guilty of gross negligence; that neither their special contract with A., nor their public notices, exempted them from liability for gross negligence; that the libellants were entitled to recover; and that it was not necessary that the proceeding should be instituted in the name of A. *New Jersey, &c. v. Merchants' Bank*, 6 How. U. S. 344.

It is held that, where there is a special acceptance of goods, the *onus* of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier. *Swindler v. Hilliard*, 2 Rich. 286. But see *Slocum v. Fairchild*, 7 Hill, 292; *Fish v. Chapman*, 2 Kelly, 349.

The plaintiffs declared against the defendants as common carriers, subject to the terms of a special notice, for the loss of a truss of silk, by their gross negligence, and the felonious acts of their servants. The defendants pleaded, except as to the gross negligence and felony, that the goods were such as are excepted in the carriers' act, and that the defendants did not declare their value. The plaintiffs new assigned, that they had brought action, for that the defendants' servants had feloniously stolen the goods. The new assignment was held bad, on demurrer; and the plaintiffs were allowed to amend on payment of costs, and to reply that the goods were lost by the felony of the defendants' servants, through the gross negligence of the defendants. Held, also, that the allegation of gross negligence and felony in the declaration was surplusage, and that a replication of felony only without an allegation of gross negligence would have been bad. *Butt v. The Great Western, &c.* 7 Eng. L. & Eq. 443.

knowledge of the owner, limit his responsibility for carrying certain commodities beyond the line of his general business, or make his responsibility depend upon certain reasonable conditions.¹ Thus, in case of such notice, the carrier's agent told the female servant of the owner of a parcel, that it ought to be insured. Held, not sufficient.² So, where the plaintiff had for three years taken a newspaper in which the notice was advertised every week; the jury still having found a verdict for the plaintiff, the Court refused to grant a new trial.³ So, in an action against coach-proprietors for the loss of a parcel, the defendants proved a notice, exposed in a booking-office at Salisbury, kept by a person named Weeks. One Weeks was a defendant on the record; but no evidence was offered, that he was the Weeks above mentioned. Held, not a sufficient notice.⁴ But where an agent, employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank-notes to a common carrier, to be forwarded to his principals in London, which parcel was lost; and the carriers had given notice, that they would not be accountable for parcels containing bank-notes; and the agent had no knowledge of such notice, but the principals had: held, it was their duty to have instructed their agent not to send bank-notes by that carrier, and the latter was not responsible.⁵

42. A carrier may undoubtedly *wave* his rights arising from the notice referred to. But a carrier, who had given notice that he would not be liable for loss or damage, unless occasioned by the actual negligence of the master or mariners, was held not to have waived that notice, by having on former occasions made allowances to the plaintiffs for damage, without inquiring into the cause of such damage.⁶

43. It is held, that the duty and liability of a common carrier may be modified by the particular *usage* of the carrier,

¹ Farmers, &c. v. Champlain, &c. 23 Verm. 186.

² Macklin v. Waterhouse, 5 Bing. 212.

³ Rowley v. Horne, 10 Moore, 247; 3 Bing. 2.

⁴ Macklin v. Waterhouse, 2 Moo. & P. 319.

⁵ Mayhew v. Eames, 3 B. & C. 601; 5 Dowl. & R. 484.

⁶ Evans v. Soule, 2 M. & S. 1.

without proof that the consignor had knowledge of such usage.¹ (a)

44. The liability of a common carrier of *passengers* is somewhat different from that of a carrier of merchandise. It is said, "The carrier of goods has absolute control over them while they are in his hands; he can fasten them with ropes, or box them up, or put them under lock and key. But the carrier of passengers must leave to them some power of self-direction, some freedom of motion, some care of themselves."² Upon this ground is founded the well established rule, that, instead of being liable for all losses, except those resulting from the act of God or the public enemy; in the case of common carriers of *passengers*, the highest degree of care and diligence, which a reasonable and cautious man would use, is required by law. This rule applies alike to the character of the vehicle, which must be *road-worthy*, the horses, which must be well broken and steady, the harness, the skill, caution, and sobriety of the driver, his knowledge of the road, watchfulness, and his conduct under every emergency or difficulty. The contract to carry passengers differs from that to carry freight only in this, that, in the latter case, the carrier is responsible at all events, except for the act of God and the public enemy.³ (b) Thus passenger carriers by stages

¹ *Farmers, &c. v. Champlain, &c.* 18 Verm. 131.

² 1 Pars. on Con. 695. See *M'Clenaghan v. Brock*, 5 Rich. 17.

³ *Derwort v. Loomer*, 21 Conn. 245; 11 Gratt. 697; 9 Bing. 457; 4 Gill,

406; 3 M'Lean, 22; 16 Verm. 566; *Fuller v. Naugatuck, &c.* 21 Conn. 557.

See *Great, &c. v. Harrison*, 26 Eng. L. & Eq. 443; *Notton v. The Western, &c.* 15 Court of App. N. Y. 444; *Derby v. Philadelphia, &c.* 14 How. 483.

(a) But it has been held, that a common carrier upon a canal cannot, in the absence of an express contract, limit his liability, by showing that, by a custom on the canal, carriers are not liable for losses resulting from the dangers of the navigation, from fire, or from inevitable accident. *Coxe v. Heisley*, 19 Penn. 243.

The owners of a steamboat are not liable for the loss of money intrusted to the clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown. *Whitmore v. Caroline*, 20 Miss. 513.

(b) Proof that the plaintiff was a passenger, of the accident and the in-

are liable for injuries resulting even from the slightest negligence on the part of the coachman or proprietor of the stage. If the coach was upset by the running of the horses, and they ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the running off of the horses might have been prevented, if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake; the proprietors are liable. Or if the quantity of baggage on the top of a stage-coach causes it to upset. And where a passenger is injured by the overturning of the coach, the *prima facie* presumption is, that it occurred by the negligence of the coachman, and the burden of proof is on the proprietors of the coach, to establish that there was no negligence whatsoever; and, although this presumption may be repelled, by proof that the coach was reasonably strong, with suitable harness, trappings, and equipments, of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet, if the running off of the horses caused the overturning of the coach, and such running off might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable.¹ It is said, the obligation of a stage-proprietor has respect to the team, the load, and the state of the road, as well as the manner of driving; therefore, evidence in reference to each of the above mentioned points is admissible.² And although the accident may have occurred through the recklessness of the driver of another stage, who may be liable, and also his employers; yet, if there is any want of skill and prudence in the driver

¹ Farish v. Reigle, 11 Gratt. 697.

² Taylor v. Day, 16 Verm. 566.

jury, makes a *prima facie* case of negligence; and the burden of proof is on the defendant to rebut it. Galena, &c. v. Yarwood, 17 Ill. 509.

of the stage to which the accident occurred, his principals are liable.¹ So, if an accident happen from a defect in the construction of the vehicle, the proprietor is liable, although the defect be out of sight, and not discoverable upon ordinary examination.² But a less rigid rule has been adopted in the more recent decisions. Thus it is held, that, if an accident happens from a defect in the coach which might have been discovered by the most careful examination, the carrier is responsible. Otherwise, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by a sound judgment and the most vigilant oversight.³ So it is held, that the proprietor of a stage-coach is not liable, for an injury sustained by a passenger, in consequence of the accidental overturning of the coach, unless occasioned by the negligence or misconduct of the driver. Therefore, where the cause of the accident was the removal, since the coach had last passed, of one of two cottages, which had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road, (it being night, though moonlight,) and the Judge told the jury, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits, and a verdict was found for the plaintiff; the Court granted a new trial, upon the ground that it should have been left to the jury to say, whether or not the driver had been guilty of negligence.⁴ (a)

¹ Peck v. Neil, 3 McLean, 22, 26.

² Sharpe v. Grey, 9 Bing. 457; 2 Moo. & S. 620.

³ Ingalls v. Bills, 9 Met. 1. See

Ware v. Gay, 11 Pick. 106; Stokes v. Saltonstall, 13 Pet. 181.

⁴ Crofts v. Waterhouse, 11 Moo. 133.

(a) The general rule does not apply to a mere private conveyance, without compensation. Thus the plaintiff employed the defendant to remove her goods in his cart for hire. With the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken. Held, the plaintiff was not entitled to damages for the personal injury. *Lygo v. Newbold*, 24 Eng. L. & Eq. 507.

45. It has been formerly held, that a coachman is not liable for the loss of *goods* of his passenger, for the carriage of which he is not paid.¹ (a) But the contrary rule is now adopted, that, in a suit against stage-owners for loss of *baggage*, payment of the fare need not be expressly proved. It may be inferred. And even if not paid, the passenger is liable for it, and the owners are therefore bound to use ordinary diligence.² And a stage contractor is liable, as a common carrier, for the baggage of a passenger, under the weight which he is allowed to carry without paying freight; though no entry was made of the baggage on the way-bill kept by the stage contractor for his own use.³

46. In regard to the kind, quantity, and value of articles, for which a carrier of passengers is responsible; by receiving the baggage of a traveller, including such articles as are necessary for his personal convenience, who has engaged his passage, the carrier becomes immediately responsible for its safe delivery at the place of destination.⁴ Thus, where a carpenter took passage in a stage, and his trunk, containing clothing and tools to the value of \$55, was lost; held, the stage-proprietors were liable for all the contents of the trunk.⁵ So a common carrier of passengers is liable for the loss of a pocket-pistol and a pair of duelling-pistols, contained in a

¹ *Upshare v. Aidee*, 1 Com. 24.

³ *Peixotti v. McLaughlin*, 1 Strobb.

² *McGill v. Rowand*, 3 Barr, 451. 468.

See *Dibble v. Brown*, 12 Geo. 217;

Weed v. Panama, &c. 5 Duer, 193.

⁴ *Woods v. Devin*, 13 Ill. 746; 9 Humph. 621.

⁵ *Porter v. Hildebrand*, 14 Penn. 129.

(a) The peculiar arrangements of railroad corporations have given rise to a new form or evidence of liability for baggage. A *check* is said to stand in the place of a bill of lading. *Dill v. Railway Co.* 7 Rich. 158.

Where different roads, forming a continuous line, run their cars over the whole line, sell through-tickets, and check the baggage through; either company is liable for a loss of baggage. *Hart v. Rensselaer, &c.* 4 Seld. 37.

Where the company employ porters at their stations, to carry baggage to the carriages taken by passengers; the company are liable till delivery to the carriage. *Richards v. The London, &c.* 7 Com. B. 839. See *Tower v. Utica, &c.* 7 Hill, 47; *East, &c. v. Lythgee*, 10 Com. B. 726.

carpet-bag of a passenger, which is stolen from the carrier.¹ So common carriers of passengers are responsible for money, *bonâ fide* included in the baggage of a passenger for traveling expenses and personal use, allowing for accidents and contingencies, to an amount proper and necessary for these purposes; but not for money beyond that amount, or intended for other purposes, unless in case of gross negligence.² And a notice, that a railroad corporation would not "be liable for the baggage of passengers beyond a certain amount, unless, &c.," printed on the back of the passage-ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party, *at the time of receiving the ticket*, and before the train leaves the station, had knowledge of the limitations or conditions; but it is a question for the jury.³ And even a public notice, disclaiming liability except on certain conditions, will not excuse the carrier in case of gross negligence. Thus a common travelling trunk, of a large size, containing apparel and jewels, having been lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely; held, he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing; that, under these circumstances, the question for the jury was, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed.⁴

47. As in other cases, a party cannot recover for a loss of this description, where he has himself been in fault, or de-

¹ Wood v. Devin, 13 Ill. 746.

⁴ Brook v. Pickwick, 4 Bing. 218.

² Jordan v. Fall River, &c. 5 Cush.

See Piaciani v. London, &c. 36 Eng.

69; Johnson v. Stone, 11 Humph. 419.

L. & Eq. 418.

³ Brown v. Eastern. &c. 11 Cush. 97.

viated from the ordinary course of dealing, in reference to the article lost, or himself taken special charge of it; more especially, if the property is rather of the nature of *freight* than *baggage*. Thus the plaintiff received a parcel from A., to book for London, at the office of the defendants, common carriers; but, instead thereof, put the parcel into his bag, intending to take it to London himself, and took a place in the defendant's coach. The bag being lost; held, the plaintiff could not recover.¹ So, where the plaintiff sent by a passenger train a quantity of merchandise, expecting to go himself in the same train, but did not; and the goods were lost without any gross negligence in the carrier, or any conversion by him; held, the carrier was not liable.² So, where an overcoat belonging to a passenger was not delivered to the defendants, a railroad company, but the passenger, having placed it on his seat, forgot to take it with him when he left, and it was afterwards stolen; held, the defendants were not liable.³ So, where an emigrant passenger in the defendant's ship, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth with ropes; and during the voyage it was stolen; held, the owners of the ship were not liable for its value.⁴ And, as already stated, the implied obligation of a common carrier to carry the baggage of a passenger does not extend beyond ordinary baggage, or such as a traveller usually carries with him for his personal convenience; nor does it include more money than a reasonable amount to pay travelling expenses.⁵ Nor does the term "baggage" include *articles of merchandise*, not intended for personal use, which are in the nature of *baggage* or *freight*, but not paid for as such; such as "thirty-eight pairs of new shoes, sixty pairs of stock for boys' shoes, and two papers of shoe-nails."⁶ The articles of property treated as baggage, under the decisions of different

¹ *Miles v. Cattle*, 6 Bing. 743.

² *Collins v. Boston, &c.* 10 Cush. 506.

³ *Tower v. Utica, &c.* 7 Hill. 47.

⁴ *Cohen v. Frost*, 2 Duer, 335.

⁵ *Whitmore v. Caroline*, 20 Mis. 513.

Collins v. Boston, &c. 10 Cush. 506.

courts, are said to be clothing, money for travelling expenses, a few books for reading on the journey, a watch, a lady's jewelry for dressing, &c.¹ But a common carrier who takes charge of a passenger's valise, as baggage, without notice that a large amount of gold is in the valise, is not liable for the loss of the gold, even though purloined by one of his agents.²

48. *Ferryman* are common carriers of all property, which they carry in their boats, whether accompanied by passengers or not. And it is held, that passengers on board a ferry-boat, and taking care of their own property, while acting in good faith, may be considered as agents of the ferryman, who will be liable therefor as a common carrier.³ (a)

¹ Doyle v. Kiser, 6 Ind. 242.

² Fisher v. Clisbee, 12 Ill. 344.

³ Ibid.

(a) A traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for their transportation, selects a place for himself, and retains the custody of his horse, without committing him to the care of the ferryman or his servants, or signifying any wish or purpose so to do, is bound to use ordinary care and diligence in the custody of his horse, to prevent the loss or injury of his property, by his horse taking fright or becoming restless. If the traveller neglects his duty in this respect, leaving his horse without any oversight, and the horse becomes frightened at the sound of the bell of the boat, springs against the chain, stretched across the end of the boat, and attached to a hook, insufficient in strength for the purpose for which it is designed, breaks the hook, and throws himself and the wagon overboard, whereby the horse is drowned, and the merchandise in the wagon injured, without any fault on the part of the ferryman, when, by proper care and attention on the part of the traveller, the accident would not probably have occurred; the proprietors of the ferry are not responsible. *White v. Winnisimmet Co.* 7 Cush. 155.

. The defendants, leasees of a ferry over a river, ran steamboats across, for passengers and goods. They also carried animals, but it was not their practice to take charge of the animals when on board. The plaintiff, having paid the usual fare, led his mare on board at one side of the river, and remained with her, until the steamboat reached the other side. For landing the passengers and animals, the defendants had provided a movable slip, leading from the boat to a landing barge. The slip had a handrail, which had been twice recently, to the defendant's knowledge, broken by the pressure of a horse on landing; and in the handrail was an iron spike, which

49. In an action against a stage contractor for the loss of a trunk, slight and *prima facie* evidence is admissible, of the contents of the trunk.¹ And it is held that the plaintiff's own evidence is admissible to prove the contents of his trunk, and the value of the baggage taken from it, in a suit by a passenger against a common carrier, to recover the value of baggage taken from a trunk, broken open and despoiled while in the possession of the carrier; that *from the necessity of the case*, the owner of a trunk, having first otherwise proved its delivery to the carrier and its loss, or the loss of articles stolen from it, is a competent witness in a suit brought by him against a common carrier for its loss, to prove the contents of the trunk, and their value. So also the wife of the owner.² But this rule will not be extended further, than to the proof of such articles as are commonly carried in a travelling trunk.³

50. In reference to the defence, that the injury for which an action is brought occurred by the fault of the plaintiff himself; it is held, in the case of a railroad, that the law does not require of passengers in cars an exercise, in imminent peril, of all the presence of mind and care of a prudent and careful man; but the circumstances will be left to the jury, to say, from them, whether the party acted rashly and under undue apprehension of danger.⁴ And in an action for

¹ Peiscotti v. M'Laughlin, 1 Strobh. 468.

² 20 Ohio, 318.

³ Johnson v. Stone, 11 Humph. 419; 509.

⁴ Galena, &c. v. Yarwood, 17 Ill.

Mad River, &c. v. Fulton, 20 Ohio, 318.

appeared whenever the rail gave way. The defendants had also been cautioned that the slip was unsafe. They, notwithstanding, continued to use the slip, leaving the broken rail slightly tied up, so that it appeared sound. Over this slip the plaintiff proceeded to lead his mare towards the shore, but the mare pressed against the rail, the latter gave way, and the iron spike concealed in it injured her severely. Held, the defendants, as ferrymen, were bound to provide proper means for the embarkation and landing of the animals they carried for hire, and, although the mare was under the control and management of the plaintiff, they were liable for the injury. Willoughby v. Horridge, 16 Eng. L. & Eq. 437.

an injury occasioned by the negligence of the company's servants, it is not sufficient for the company to show, that the plaintiff was acting, at the time of the injury, in disobedience of a reasonable order for his safety; but it must also appear that such disobedience contributed to the injury.¹ So a passenger on a stage-coach may, in case of accident arising from the neglect of the carrier, and in the exercise of reasonable discretion, leap from it to save himself, and maintain an action against the carrier for injuries arising from such leap.² So where a passenger, at the time of a collision, is in the baggage-car, with the knowledge of the conductor, he may recover, though he might or would not otherwise have been injured.³ But a railroad company is not liable for running over one walking on the track.⁴

51. A carrier may *detain* goods for his hire.⁵ And it was formerly held, that this might be done even against the true owner, although the goods were delivered to the carrier by a person who had no right to them.⁶ But the more recent doctrine is, that a common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner.⁷

52. If a common carrier be induced to deliver goods to the consignee by a false and fraudulent promise of the latter, that he will pay the freight as soon as they are received; the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm, and sue the consignee in *replevin*.⁸ (a)

¹ Lawrenceburg, &c. v. Montgomery, 7 Ind. 474.

² Frink v. Potter, 17 Ill. 406.

³ Carroll v. N. Y. &c. 1 Duer, 571. But see Robertson v. N. Y. &c. 22 Barb. 91. See also the Pennsylvania, &c. v. M'Closkey, 23 Penn. 532.

⁴ Brand v. Troy, &c. 8 Barb. 368.

⁵ Skinner v. Upshaw, 2 Ld. Raym.

752. See Oppenheim v. Russell, 3 B. & P. 42.

⁶ Yorke v. Grenough, 2 Ld. Raym. 867.

⁷ Robinson v. Baker, 5 Cush. 137. See Ang. on Car. § 363; Fitch, &c. v. Goodell, 1 Doug. 1; Buskirk v. Purington, 2 Hall, 561.

⁸ Bigelow v. Heaton, 6 Hill, 43.

(a) In reference to the *remedies* in case of bailment; as has been often incidentally mentioned in the course of the present work, to maintain tres-

pass for taking and carrying away chattels, the plaintiff must have actual possession, or a right to immediate possession, at the time of the taking. Hence a bailor of chattels cannot maintain trespass against one who unlawfully takes them from the bailee during the bailment; and this rule holds, in case of an attachment of the chattels by an officer, as the property of a third person. *Muggridge v. Eveleth*, 9 Met. 233.

But, under some circumstances, the general owner or bailor may retain a sufficient possessory title, to support an action against one who wrongfully interferes with the property. Thus the owner of cotton is the proper person to bring an action against a warehouseman for failure to discharge his duty, and not a person who has a special lien on it for money advanced, and who controlled the shipment. *Scott v. Jester*, 13 Ark. 437.

If the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage, the bailor may maintain an action of trespass therefor against him, without a previous demand. *Stanley v. Gaylord*, 1 Cush. 536.

So a father, owning horses and carriages, put them into the possession of his son, to enable him to earn his livelihood, making no stipulation as to the time the son should keep them, and telling him that, whenever he (the father) should be put to any expense on account of them, he should take them away and sell them. The son established a livery-stable accordingly, paying the expenses himself, and taking the profits to his own use, and on one occasion let a horse and carriage to go to a particular place; but the hirer drove them to another place, where they were attached as the son's property, and the officer refused to give them up when demanded by the father. Held, the father had such a right of possession, as entitled him to maintain trover against the officer. *Morgan v. Ida*, 8 Cush. 420. See *Lewis v. Mobley*, 4 Dev. & B. 323.

So, where the owner of beds let them for hire at a stipulated price by the month, payable in advance, and the hirer, within the month for which the last payment was made, abandoned the house in which he used the beds, leaving them there, and sending word to the owner that they were ready for him; held, the owner thereby became entitled to immediate possession of the beds, and might maintain trover therefor, before he received notice of the abandonment. *Hardy v. Reed*, 6 Cush. 252.

The bailee of a sheriff, to whom the property of a third person is delivered, upon a contract to return it at the sale-day, has such a property in the thing bailed as will authorize him to sue a wrongdoer, for depriving him of the possession. (See chap. 21.) *Cox v. Easley*, 11 Ala. 362.

But a bailee, who holds property for the purpose of performing work upon it for a compensation, by which the property is not to be deprived of its original character, has only a special property in it; and if, after the com-

pletion of his work, he delivers it to a common carrier for the general owner, he loses his special property, and can maintain no action against the carrier for the loss of the goods. *Morse v. Androscoffin, &c.* 39 Maine, 285.

The bailee of personal property may, in an action against a stranger, recover damages commensurate with the injury done to the property, by such stranger, while in the bailee's possession. *Little v. Fossett*, 34 Maine, 545.

Where a wharfinger or warehouseman insures goods deposited with him, he is entitled, in case of loss, to recover the full value of the goods destroyed; but he is liable to the true owners for the excess of the money received beyond the amount of his own charges. *Waters v. Monarch, &c.* 34 Eng. L. & Eq. 116.

So, in trover by a bailee against the real owner, the plaintiff can recover the amount of his special property only; but, if the action is against a stranger, the full value of the article, holding the balance, beyond his special interest, in trust for the general owner, to whom he is responsible. *Benjamin v. Strempel*, 18 Ill. 466.

A bailee may, under some circumstances, not have such possession as will give him the control of the property in reference to third persons. Thus where the defendant hired a steamboat for an excursion to Richmond, the owner's captain navigating the vessel; held, the defendant had not such a possession as to justify him in forcibly turning out a stranger, whom the captain had allowed to come on board. *Dean v. Hogg*, 10 Bing. 345.

The plaintiff delivered to A. certain stock for clock-making, watches, watch materials, jewelry, &c., under an agreement in writing, that A. should manufacture, repair, and put in order the property, and that he might sell it, or exchange it for certain other specified descriptions of property, and that the plaintiff would take back all the property, if requested, after three years, and before, if the parties could agree; or that, if the plaintiff should request, the whole property should be his at all times, and, if A. should exchange the property for any description of property not authorized by the agreement, or should use any of the property, he should charge such property to himself, and become responsible to pay for the same; and that A. would manufacture, repair, and dispose of the property as stipulated; and that, having received pay for so doing, all the profit "should belong, together with the property, to the plaintiff." A. received property under the contract, and was working and trading with the same; and while he was so doing, the property was attached by the defendant as belonging to A. Held, the plaintiff had a right to immediate possession, which would sustain an action of trover. *Batchelder v. Warren*, 19 Verm. 371.

So the plaintiff leased his only cow for one year, and, during that time,

the defendant, a deputy sheriff, levied upon the cow by virtue of an execution against the plaintiff, but left her in the possession of the lessee until the expiration of the year, and then drove her away and sold her. Held, although the plaintiff might not have been able to sustain trespass for the levy within the year, yet the cow, after the determination of the bailment, was constructively in his possession, and the driving away of the cow was a fresh trespass, for which the plaintiff might maintain the action. *Keyes v. Howe*, 18 Verm. 411.

An action cannot be sustained against a mere *deposiary* of money, unless his situation has been changed from that of a depository to that of a debtor, either by a wrongful refusal to pay the money upon proper request, or by a wrongful appropriation of it. *Jackman v. Partridge*, 21 Verm. 558; *Phelps v. Bostwick*, 22 Barb. 314; *Montgomery v. Evans*, 8 Geo. 178.

A. sends his horse, for the night, to B., who turns it out after dark into his pasture-field, adjoining to and separated from a field of C. by a fence, which C. was bound to repair. The horse, from the bad state of the fence, falls from one field into the other, and is killed. Held, that B., though a gratuitous bailee, might maintain an action against C., and recover the value of the horse. *Booth v. Wilson*, 1 B. & Ald. 59.

It remains to give a brief view of the wrongs which may be committed in connection with two other private relations; viz. that of *landlord and tenant*, and that of *mortgagor and mortgagee*. Both these relations grow out of *written contracts or conveyances*; and the law pertaining to them is therefore for the most part foreign from the general subject of the present work, and requires only a proportionally brief and comprehensive statement.

A tenant and landlord may both maintain actions at the same time for injuries done to the estate; the former, for the interruption of his possession and diminution of his profits; the latter, for the permanent injury to his property. *George v. Fisk*, 32 N. H. 82.

Thus, where part of a lot of land under lease is taken by a city to widen a street, the lease is not thereby extinguished, nor the lessee discharged from the rent. But the lessor and lessee are each entitled to recover damages. *Parks v. Boston*, 15 Pick. 198.

But where the lessee of a store is prohibited, under certain penalties, by the lease, from making any alterations in the store without consent of the lessor, and, subsequently to the execution of the lease, the street is widened by the city; the city is not responsible to the lessee for any damage occasioned by a delay, on the part of the lessor, to give his consent to the alterations rendered necessary by the widening of the street. *Brooks v. Boston*, 19 Pick. 174.

In an action by the lessee against the city, evidence that his sales were less during the time when the street, as widened, was being fitted for use, than in the corresponding season of the next year after the alteration had been completed, is not admissible, unless connected with other evidence, that the diminution of business was occasioned by the operation of widening the street. *Ibid.*

And a city or town is not responsible for the inconvenience and loss of business occasioned to the abutters on a street, by incumbrances and obstructions placed in the street for the purpose of repairing it, or by opening a common sewer in the street. *Ibid.*

A tenant may maintain trespass *qu. claus.* against the landlord for any interference with the leased premises in violation of the lease. Thus a tenant from year to year, being desirous of letting his house for a quarter, quits and leaves it locked up, with authority to his landlord to let it during his absence, and for that purpose leaves the key with a neighbor. An opportunity of letting offers, but, the person who has the key having absconded, the landlord enters, by placing a ladder against the house, and raising the first floor window, and, after showing the house, leaves it in the same state as before. The house is afterwards broken open by persons unknown, and some of the tenant's furniture and wearing apparel is stolen. Trespass is brought against the landlord for breaking and entering the house, and leaving it insecure, *per quod* the tenant's furniture and wearing apparel were stolen. Held, a plea of leave and license was no answer to the action. *Ancaster v. Milling*, 2 Dowl. & Ry. 714.

Under a statute of forcible entry, &c., if a tenant at will of a dwelling-house hold over his term, and thereupon, after due notice to quit, the landlord forcibly enter and eject him, his family, and effects from the house; the entry is unlawful, and the tenant may recover in trespass *qu. claus.*; though he had agreed to leave by a certain day, and that, if he did not leave, the landlord might put out him and his effects in any way he chose. *Dustin v. Cowdry*, 23 Verm. 681.

So a lessee, stipulating to pay and deliver one third of the crop for rent, may maintain trespass against his landlord for entering and taking it. *Blake v. Coats*, 3 Iowa, 548.

So a tenant at will, whose estate has not been legally determined, may maintain trespass *qu. claus.* against his landlord, for entering and cutting off a pump upon the premises. *Dickinson v. Goodspeed*, 8 Cush. 119.

If a lease be made with exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power to another person; but if it be not properly pursued, the lessee may maintain trespass both against the lessor and his assignee. *Warren v. Arthur*, 2 Mod. 317.

But where a tenant at will of a house remains in possession, after refusing or neglecting to pay the rent that is due, and after the landlord has

given him in writing the legal notice to quit, he cannot maintain trespass against the landlord for entering the house with force, and taking away the windows and inside doors thereof. *Meador v. Stone*, 7 Met. 147.

Nor can such action be maintained, where, a tenant having omitted to deliver up possession when his term had expired, after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession; though some articles of furniture remained. *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158.

The landlord may also be liable to an *action on the case*. But where a tenant for a year brings an action on the case against his landlord, during the term, for obstructing lights; damages can only be given for the time before commencement of the suit, and not for the whole term. *Blunt v. McCormick*, 3 Denio, 283.

And a tenant cannot recover damages from his landlord, caused by a nuisance on the demised premises, unless he alleges and proves that the defendant is liable on some contract, or that the nuisance arises from some act with which he is connected. *Vai v. Weld*, 17 Mis. 232.

The question may arise, whether the landlord or the tenant is responsible to a third person for any act or neglect connected with the leased premises. Thus, where a town is compelled to pay damages for an injury resulting from a defect in a highway, occasioned by the want of repair of a cellarway constructed in the sidewalk, and leading to a building adjoining thereto, in the occupation of a tenant; the occupant and not the owner is liable to the town for such damages. But if there was an express agreement between the landlord and tenant, that the former should keep the premises in repair, then, to avoid circuity of action, the landlord would be liable in the first instance. *Lowell v. Spaulding*, 4 Cush. 277.

And an action for damage done to the plaintiff's house, by water falling from the defendant's eaves, they being out of repair, will lie against the landlord, if it be not shown that the tenant was bound to repair. *Bellows v. Sackett*, 15 Barb. 96.

So case lies against a landlord who, under his contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Leslie v. Pounds*, 4 Taunt. 649.

So where a defendant, in an action for damages occasioned by blasting, had rented his quarries, but was present on several occasions, and by his conduct adopted the acts of his tenants, assumed the responsibility of the acts complained of, and defied legal proceedings; the injuries cannot be held to be the acts of the tenants exclusively. *Scott v. Bay*, 3 Md. 431.

So, in case of the erection of a barn or stable upon the defendant's land, adjoining the plaintiff's dwelling-house, and allowing manure and filthy water to accumulate and stand in the cellar; if the defendant constructed and adapted the barn, so that in its ordinary use it would be injurious and

for a short time, unavoidably was penned back, &c., and ran out, as in the declaration mentioned; that the defendant, in a reasonable time after he had notice that the watercourse was so choked up, &c., and before action brought, cleansed out the same, so that the water flowed as it ought to do. Held, on general demurrer, that the alleged default of the tenant was no answer, the plea not showing that the owners and occupiers of the estate for the time being were bound to repair the wall. Also, that the defendant could not excuse himself, by averring that he repaired as soon as he had notice of the injury, since he became liable when the injury occurred. *Bell v. Twentyman*, 1 Ad. & Ell. N. S. 766.

But a lessor cannot maintain trespass *qu. claus.*, while there is a tenant in possession. *Rousin v. Benton*, 6 Mis. 592.

Where real property is in the possession of a lessee other than a tenant at will, case, and not trespass, is the proper form of action to be brought by the landlord, for an injury by a stranger affecting the inheritance; even where trespass would be the proper remedy, if the landlord were himself in possession. *Lienow v. Ritchie*, 8 Pick. 235.

Thus trespass for an injury to timber, during the possession of the lessee for years, cannot be maintained by the landlord against a stranger, although the lessee was restricted from cutting the timber. Otherwise, if the timber is expressly reserved in the lease. *Greber v. Kleckner*, 2 Barr, 289.

And it is held that the owner of land cannot maintain trespass *qu. claus.* for an injury to premises in possession even of a tenant at will, unless the freehold or some fixture on it is injured. *Lyford v. Toothaker*, 39 Maine, 28.

So in order to maintain *trover*, the plaintiff must have the right of possession as well as of property. Therefore where furniture, leased with a house, was wrongfully taken in execution by the sheriff; held, the landlord could not maintain *trover* pending the lease. *Gordon v. Harper*, 7 T. R. 9.

But it has been held that trespass *qu. claus.* lies for the owner of land in the occupation of his tenant at will, where the injury affects the permanent value of the property; as the cutting down of trees, destruction of buildings, &c. *Starr v. Jackson*, 11 Mass. 519.

And where the owner of a mill lets it to one who is to receive part of the tolls, the owner himself must sue for trespass. *Wilson v. Crosby, Wright*, 288.

So where the owner of a building leases at will the rooms therein, though they constitute the chief part of the building, he still retains such possession as will maintain trespass for the destruction of the building or any injury which renders it untenable. *Curtis v. Hoyt*, 19 Conn. 154.

With reference to torts in connection with the relation of *mortgagor* and *mortgagee*; it has been held that a mortgagee cannot maintain an action for

waste against the mortgagor, at least until after the forfeiture of the mortgage. *Peterson v. Clark*, 15 Johns. 205.

So the treble damages, provided for by the Massachusetts Revised Statutes, c. 105, § 9, where a tenant in possession of land, for the recovery of which an action is pending against him, commits waste thereon during the pendency of the action, can only be recovered in the manner provided by the statute, and cannot be made an item of charge by mortgagor against mortgagee, in an account stated between them by a master in chancery, on a bill in equity to redeem. *Boston Iron Co. v. King*, 2 Cush. 400.

But a mortgagee may maintain an action on the case against the mortgagor, or a person claiming under him, for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for sale of the premises, where the mortgagor is insolvent, and the premises are a slender security for the debt. *Southworth v. Van Pelt*, 3 Barb. 347.

And it is held that an action on the case will lie, by the holder of a mortgage on lands, against the mortgagor or the purchaser from him of the equity of redemption, for acts of waste, committed with a knowledge that the value of the security will be injured thereby, the premises being a scanty security for the debt; as where the defendant, who had purchased under the mortgagor, took away fences, and cut down and carried away valuable timber, with a knowledge of the existence of the mortgage, and the insolvency of the mortgagor. Nor is it necessary to show that the primary motive of the defendant was to injure the plaintiff's security, if done with a full knowledge of the circumstances, although primarily with a view to his own emolument. *Van Pelt v. McGraw*, 4 Comst. 110.

After sale of mortgaged premises under decree and execution, the mortgagor in possession will be restrained from committing waste. *Phoenix v. Clark*, 2 Halst. Ch. 447.

And, in general, a mortgagee is entitled to an injunction, to restrain the mortgagor from the commission of waste, by which the mortgage security is in danger of being reduced in value below the amount of the mortgage debt. And the Court will not only restrain waste, but will, if the bill be brought for that purpose, proceed and take an account of the waste actually committed, and decree satisfaction therefor; not only against the mortgagor, but also against those not connected with the mortgage title, who have committed waste by license from him, after condition broken, and with full knowledge of the respective rights of the mortgagor and mortgagee. *Hastings v. Perry*, 20 Verm. 272. See *Johnson v. White*, 11 Barb. 194.

A mortgagor in possession may maintain trespass *qu. claus.* *Earle v. Hall*, 2 Met. 356.

So, in trover, the defendant cannot justify, by showing a mortgage from the plaintiff to a third person. *Gaines v. Briggs*, 4 Eng. 46.

The plaintiff mortgaged personal property, and, before he registered the

mortgage, which by law was necessary to pass the title, the property was sold on execution against the mortgagee. Held, the plaintiff could not maintain trover against the officer; but, as the property was sold without an order of court, he could have a special action for the injury to his right of property. *Murchison v. White*, 8 Ind. 52.

In regard to the right of action of a mortgagee, a mortgagee has no property in trees cut down by a mortgagor in possession, so as to maintain trover against him. *Peterson v. Clark*, 15 Johns. 205.

But a mortgagee not in actual possession may, after condition broken, maintain trespass against the mortgagor, for cutting and carrying to market timber trees standing on the premises. *Page v. Robinson*, 10 Cush. 99.

And the mortgagee of timber lands may maintain trespass or trover against any one who shall cut and carry away the timber, or afterwards convert it to his own use, without authority from such mortgagee, although under a license from the mortgagor given after the mortgage. *Frothingham v. M'Kusick*, 11 Shep. 403.

A mortgage of goods vests the general property in the mortgagee, who has the immediate right of possession, unless there is an express stipulation to the contrary, and may maintain trespass against him who wrongfully takes the goods away, although he has not given notice to the mortgagor or person in possession, pursuant to Stat. 1843, c. 72, § 1, of his intention to foreclose the mortgage. *Brackets v. Bullard*, 12 Met. 308.

So, although the trespass be committed before the debt becomes due. *Woodruff v. Halsey*, 8 Pick. 333.

A mortgagee of a building, standing on land of a third person, may maintain trespass against a stranger who pulls down and carries away the building, the building being occupied at the time of the trespass, and the mortgagee not having taken actual possession. *Ibid.*

Where a person in possession of mortgaged premises, claiming under the mortgagor, refuses to yield possession to the mortgagee, upon his entry after condition broken, the mortgagee may maintain trespass against him for mesne profits, although the entry may not have been sufficient under the statute for the purpose of foreclosure. *Northampton, &c. v. Ames*, 8 Met. 1.

A stipulation in a mortgage of personal property, that the mortgagor shall remain in possession until breach of condition, is personal to the mortgagor, and cannot be assigned or transferred. The mortgagee may bring trover before breach of condition, against a purchaser from the mortgagor. *Ballune v. Wallace*, 2 Rich. 80.

If, after any default in payment of notes, maturing at different dates, to secure which a mortgage has been given, the mortgagor mortgage the goods to a third person, with notice; such third person, if he take and convert the goods to his own use, is liable for them in trover to the first mortgagee. *Burton v. Tannehill*, 6 Blackf. 470. See *Wolff v. Farrell*, 3 Brev. 68; *Coles v. Clarke*, 3 Cush. 399.

A person who aids the mortgagor of personal property, in carrying it away and concealing it, is liable to the mortgagee in trover, even though he was ignorant of the mortgage. *Flanders v. Colby*, 8 Fost. 34.

Where the mortgagor of goods, of which the mortgagee had the right of immediate possession, by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor; it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge in fact of the existence of the mortgage. *Coles v. Clarke*, 3 Cush. 399.

But where the mortgagor of personal property, in actual possession, makes an illegal sale to a third person, a servant of the purchaser, who merely carries the goods from one shop to the other, without any knowledge of the mortgage, or of any claims upon the property, but those of the seller and purchaser, is not liable to the mortgagee in trover. *Burditt v. Hunt*, 25 Maine, 419.

After a mortgage of goods had been put on record, the mortgagor, who remained in possession, assigned the goods, and aided the assignee in clandestinely removing them out of the State. In trover by the mortgagee against the assignee and one B., who at the request of the mortgagor carried away a portion of the goods and delivered them to the assignee, it was held, that, if B. did not act in concert with the assignee, or with intent to deprive the plaintiff of his property, the mere removal of a portion of the goods from one place to another, at the request of the mortgagor, was not of itself a conversion, because the mortgagor, having rightful possession, might lawfully direct such removal, if it was not done with an intent to injure the mortgagee and deprive him of his property; or, if the mortgagor had such intent and was confederate with the assignee, yet, if B. did not know it or assent to it, his act done at the request of the mortgagor would not be a conversion. *Strickland v. Barrett*, 20 Pick. 415.

It is held that no action will lie by the holder of a mortgage against another for *negligently* injuring the mortgaged premises, by which the plaintiff has lost his security. See *Alison v. M'Cave*, 15 Ohio, 726.

But an action on the case will lie against one who, *with intent to defraud the plaintiff*, has destroyed or injured the value of premises upon which he has a mortgage; the mortgage debtor being insolvent or unable to pay, which must be alleged and proved. *Gardner v. Heartt*, 3 Denio, 232.

As where an assignee of a mortgagee brings an action against a purchaser from the mortgagor, for removing buildings from the premises after they had been advertised for sale under the power in the mortgage; and before the sale. *Lane v. Hitchcock*, 14 Johns. 213.

A second mortgagee, in possession of mortgaged chattels, though the prior mortgage is unsatisfied, and the legal title is in the first mortgagee, may maintain trespass or trover against a stranger for the wrongful taking of such chattels. *White v. Webb*, 15 Conn. 302.

So, if there are two mortgages upon land, neither of the mortgagees having entered, and the mortgagor, without the assent of either of them, cuts timber upon the land, after which the first mortgage is discharged, the second mortgagee may maintain trespass *qu. claus.* for cutting the timber. *Sanders v. Reed*, 12 N. H. 558.

A. mortgaged to B., and then conveyed to C., taking back a mortgage from him for the purchase-money, which he assigned to D. After this, C. remaining in possession, another person cut timber upon the land, under a license from him, without the assent of either of the mortgagees, and subsequently the debt due to B. was paid. Held, that D., the assignee of the second mortgage, might maintain trespass *qu. claus.* against the party who cut the timber. *Ibid.*

And where personal property was mortgaged to secure a note payable in six months, it being stipulated in the deed, that, until default in payment of the note, the mortgagee should retain possession; and the next day the property was attached and sold by an officer as the mortgagor's property, without pursuing the provisions of the statute upon the subject; held, case might be maintained by the mortgagee against the officer, before the note became due; and the mortgagee might recover the value of the property, not exceeding the amount of his claim against the mortgagor, with all the damages sustained in the vindication of his rights. *Forbes v. Parker*, 16 Pick. 462.

Personal property, under mortgage, and in the possession of the mortgagee, was attached by a creditor of the mortgagor, and taken into the custody of the officer. The creditor then instituted proceedings against the mortgagor in the District Court, upon which he was adjudged a bankrupt, and the attaching officer was appointed his assignee. The property was subsequently sold by the assignee under a license from the District Court, and the proceeds distributed among the creditors of the bankrupt; and, upon the petition of the assignee, the mortgage was declared null and void by the District Court, as having been made in contravention of the bankrupt law, and ordered to be delivered up to the assignee to be cancelled. In an action of trespass by the mortgagee against the sheriff, for the act of his deputy in attaching the mortgaged property, it was held, that the action might be maintained; but that the defendant might show the subsequent proceedings in mitigation of damages, and thereby reduce them to nominal only. *Perry v. Chandler*, 2 Cush. 237.

Trover or trespass will lie by the mortgagee against the sheriff, and also against the plaintiff in the execution, who causes the seizure and sale of goods as the property of the mortgagor. *Sanders v. Vance*, 7 Monr. 209.

So, although the mortgage stipulates that the mortgagor should retain possession until default of payment, but "if the same or any part thereof shall be attached at any time before payment by any other creditor or creditors of the mortgagor, then it shall be lawful for the mortgagee to take immediate possession of the whole of said granted property to his own use." *Welch v. Whittemore*, 25 Maine, 86.

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